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Supreme Court of the United States

Supreme Court, U.S.

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October Term, 1970.

No. ~~533~~.

70-6

NELLIE SWARB, et al.,

Appellants,

v.

WILLIAM M. LENNOX, et al.,

Appellees.

On Appeal From the United States District Court for the
Eastern District of Pennsylvania.

**MOTION TO DISMISS
AND
BRIEF AND APPENDIX IN SUPPORT THEREOF.**

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OCTOBER TERM, 1970.

No. 538

NELLIE SWARB, ET AL.,

Appellants,

v.

WILLIAM M. LENNOX, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA.

MOTION TO DISMISS.

Pursuant to Rule 16(1)(b) of this Court, the Intervenor-Defendants, Middle Atlantic Finance Association, Oxford Finance Companies, Inc., Valiant Finance Company, Friendly Consumer Discount Company, Fidelity Consumer Discount Company, Major Acceptance Corp., Carver Loan & Investment Co., Inc., Abbott Finance Company, Cardinal Consumer Discount Co., Western Finance Company, Peoples Consumer Discount Co., Scott Consumer Discount Co., Central Consumer Discount Co., Nu Way Finance Co., and Mid-Penn Consumer Discount Co., hereby move to dismiss the appeals of the appellants on the ground the rulings of the Court below complained of by appellants were correct.

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BRIEF IN SUPPORT OF MOTION.

STATEMENT OF QUESTIONS PRESENTED.

1. Since the plaintiffs' proof of lack of understanding and voluntary consent of borrowers in signing documents containing confession of judgment clauses was limited to consumers whose incomes were \$10,000 or less and consumer financing transactions not involving mortgages, did not the District Court correctly exclude borrowers with incomes in excess of \$10,000 and mortgage loan borrowers from the class of borrowers benefited by the injunctive decree.

2. Even if plaintiffs had sustained their burden of proving that borrowers with incomes in excess of \$10,000 and mortgage loan borrowers do not know of and understand the significance of confession of judgment clauses in the loan instruments signed by them, would not enforcement of such clauses in Pennsylvania against such borrowers nevertheless be constitutional.

STATEMENT OF THE CASE.

In this Action, instituted against the Sheriff and Prothonotary of Philadelphia County, Pennsylvania, plaintiffs, who are the obligors on notes given by them for consumer financing purposes to sellers or lenders, sought a decree invalidating confession of judgment clauses contained in the notes, on the ground that they had not knowingly and understandingly consented to the confession of judgment procedure. Plaintiffs sued on behalf of all other Pennsylvania residents who had signed contracts containing confession of judgment clauses.

At the trial, plaintiffs only put on three witnesses. They were: (1) Doris Mims, who had purchased carpeting from, and had executed an installment contract payable to, a retail carpeting dealer, which contract had been assigned to a finance company; (2) Thomas Veney, a city detective, who had formerly handled some of the consumer complaints that had been brought into the Community Rights Division; and (3) A. E. Casnoff, a 1969 law school graduate, age 25, who had worked part-time for a finance company while attending law school.

Mims, whose income was \$6100 a year, testified that she had not read the contract, because the vendor had told her that it was not necessary for her to do so (N. T. 43); and that, therefore, she had not known that it contained a confession of judgment clause.¹

Veney testified that about 70% of the persons he had interviewed had had complaints concerning contracts (N. T. 84); that more than 95% of these contracts had contained

1. She later testified that she had entered into twelve previous loan transactions, eight of which had been paid in full and the rest of which were still open; and that she was not in default on the open loans (N. T. 49, 57-59). She did not state whether the loan instruments in these other twelve loan transactions contained a confession of judgment clause.

confession of judgment clauses (N. T. 84); that he had explained confession of judgment clauses to various of the interviewees; and that, when he had explained "the different clauses" in the contracts, various of the consumers had then expressed disbelief and surprise (N. T. 88). He did not, however, state whether a confession of judgment clause was one of the types of clauses at which interviewees expressed surprise. On cross-examination, he testified that practically all of these transactions involved contracts given by consumers to merchandise sellers and discounted by the latter with finance companies (N. T. 89). Neither on direct examination nor on cross-examination, did he testify as to the economic status of the interviewees.

Casnoff testified that he had attended approximately one hundred consumer loan transactions while employed by the aforesaid finance company. He testified that the words "Judgment Note" had appeared in ten point bold print on the finance company's note forms (N. T. 103); and that, about six to nine months before the Federal Truth in Lending Act of July 1, 1969 was enacted, the finance company commenced "to go into much greater depth with the individual and make sure he understands that he is signing a judgment note and what the judgment note means and what the implications of that judgment note are" (N. T. 113-115).

Casnoff did not testify as to the economic status of the borrowers in the foregoing loan transactions.

Next, plaintiffs introduced into evidence a survey by David Caplovitz, Ph.D., of consumer debtors in default in Philadelphia and three other cities. The Philadelphia debtors interviewed were 245 in number and 225 of them disclosed their family incomes. Of the last mentioned 225 Philadelphia debtors, only 4% of them had total family incomes in excess of \$10,000; only 13% had total family incomes between \$8,000 and \$10,000; and 61% had total

family incomes less than \$6,000 (page 185 of survey). Only 30% of the debtors interviewed had graduated from high school and one 1% of them were college graduates (page 181 of survey).

Only 124 of them answered the question which asked whether the contract contained a confession of judgment clause which permitted the company to get a court judgment against the interviewee without giving him notice. Of these 124 interviewees, 17 responded in the affirmative, 27 responded in the negative, and 77 stated that they did not know whether the contract contained such a clause.²

The evidence proffered by the intervening defendants consisted of: (a) testimony by T. F. McArdle, a loan officer of Oxford Companies, Incorporated ("Oxford"), one of the intervening defendants; (b) various forms used by Oxford, including particularly the forms required under the Federal Truth in Lending Act of July 1, 1969 (Exhibits I-3 and I-4). McArdle testified that, at the loan closings, he always explained in detail to the borrower each item on the settlement voucher, including a recording fee, which he explained was "for recording a protective judgment on one's property, as protection for our company" (N. T. 165-166). He added that he gave whatever additional explanation was necessary to make the customer understand the confession of judgment clause (N. T. 166).³

2. It should be noted that the question pertained to the interviewee's state of mind at the time of the interview rather than his state of mind at the time the loan was closed. In other words, it made no allowance for the possibility that the interviewee knew of the clause at the time when the loan was closed and thereafter forgot it.

3. He later testified that all of Oxford's loans are direct loans by it to the borrowers, i.e. that it does not purchase or discount loan obligations from vendors who sell goods or services on credit (N. T. 175-176). This distinction is important, since both the Caplovitz survey and the Veney and Mims testimony obviously pertained to credit transactions between vendors and their customers rather than loans by lending institutions to borrowers.

Next, he authenticated and explained the aforesaid Truth in Lending forms (Exhibits I-3 and I-4), and testified (N. T. 162-169): (a) that, as required by the Federal Truth in Lending Act and the Federal Reserve Board Regulation Z, Exhibit I-3, entitled "Federal Disclosure Statement," was filled out by Oxford and given to the customer in the case of all of Oxford's loan transactions; and (b) that a "Notice of Right of Rescission" (Exhibit I-4) was given to the borrower before he left. Copies of these two forms are reproduced in the Appendix, pp. 25 and 26, *infra*. It will be noted that, as is required by Section 226.8(b)(5) of Regulation Z, 12 C. F. R. 226,⁴ Exhibit I-3 requires disclosure of all security interests to be granted by the borrower to the lender; that Section 226.2(z) of Regulation Z's definition of the term "security interest" includes, *inter alia*, "confessed liens whether or not recorded"; and that the Federal Reserve Board's Interpretation of May 26, 1969, 34 F. R. 8698, construes the term "security interest" as follows:

"(b) In some of the states, confession of judgment clauses or *cognovit* provisions are lawful and make it possible for the holder of an obligation containing such clause or provision to record a lien on property of the obligor simply by recordation [sic] entry of judgment; the obligor is afforded no opportunity to enter a defense against such action prior to entry of the judgment.

(c) Since confession of judgment clauses and *cognovit* provisions in such states have the effect of depriving the obligor of the right to be notified of a pending action and to enter a defense in a judicial proceeding before judgment may be entered or recorded against him, such

4. A copy of the pertinent portions of Regulation Z is attached to the Intervenor-Defendants' Answer to the Complaint, as Exhibit 1 thereto.

clauses and provisions in those states are security interests under § 226.2(z) and for the purposes of § 226.7(a)(7), 226.8(b)(5), and 226.9. This is the case even if the judgment cannot be entered until after a default by the obligor."

Accordingly, whenever the borrower owns any real or personal property and the note or other loan instrument contains a confession of judgment clause, Exhibit I-3 is required by Regulation Z to state that the lender will acquire a security interest both in the borrower's real estate and in his personal property, regardless whether judgment can be confessed before default or only after default. Moreover, Exhibit I-3 is required to be given to the borrower before the transaction is consummated. See Regulation Z, section 226.8(a).

In view of the foregoing definition and interpretation, moreover, the aforesaid Notice of Right of Rescission, viz., Exhibit I-4, which is required by Section 226.9 of Regulation Z to be given to the borrower whenever a security interest (other than a purchase money mortgage lien) will be acquired in any real property used or expected to be used as his principal residence, is required by Section 226.9 of Regulation Z to be given to all borrowers who are existing home-owners and who sign loan instruments containing confession of judgment clauses. Exhibit I-4 notifies the borrower that the transaction may result in a lien, mortgage or other security interest on his home; and that he has a legal right to rescind at any time within the next three business days.

Thus, all or virtually all borrowers who sign instruments containing confession of judgment clauses are required to be advised (in Exhibit I-3) that a security interest will be created in designated real or personal property, and, if they are homeowners, are required to be doubly advised

to that effect (both in Exhibit I-3 and in I-4) and are required to be given a three day right of rescission (by Exhibit I-4).

It should next be noted that Veney's testimony related to conversations held by him with complaining consumers during the period of 1960 to August, 1968 (N. T. 81-82), since this was the period when he "was an investigator-detective handling the complaints in the [Community Rights] division" (N. T. 81-82). He did not testify that he continued to handle complaints after he was made the sergeant of that division in August, 1968 (N. T. 81). Accordingly, his testimony in no way dealt with the state of mind of consumer complainants subsequent to the effective date of the Federal Truth in Lending Act. Likewise, the Caplovitz survey and the Mims testimony pertained to credit or loan transactions entered into prior to that date. Furthermore, Casnoff testified that his finance company employer commenced to fully explain the confession of judgment clauses to borrowers six to nine months before the effective date of the Federal Truth in Lending Act; and McArdle testified that he had always done so.

Accordingly, all of the testimony to the effect that borrowers did not know that the loan instruments contained confession of judgment clauses is obsolete, since it pertains to the period before the effective date of the Federal Truth in Lending Act; and all of the testimony pertinent to the period after the said Act's effective date, viz., the Casnoff and McArdle testimony, was to the effect that the confession clause was fully explained to the borrowers and that disclosure was made to the borrowers of the liens on realty and personalty that would or might be acquired by reason of the confession of judgment clauses.

Moreover, to the extent that the testimony and evidence identifies the borrowers by economic status, virtually all of them had family incomes of \$10,000 or less.

SUMMARY OF THE ARGUMENT.

(1) The record did not support the inclusion of consumer borrowers with incomes in excess of \$10,000 or mortgage loan borrowers in the class of plaintiffs benefited by the decree, since there was no showing that the borrowers in these groups do not know of and understand the confession of judgment clauses when they sign the loan instruments.

(2) Even if it had been established that the borrowers in the foregoing two groups do know of and understand the confession of judgment clauses when they sign the loan instruments, the enforcement of judgments entered by confession against such borrowers would nevertheless be constitutional, since:

(a) The negligent failure of a person who signs a contract to read its terms does not vitiate his consent to its terms;

(b) Since execution sale as to realty is precluded *until forty-one days after judgment has been entered by confession*, and since execution sale as to personalty is precluded *until twenty-seven days after judgment has been thus entered*, the borrower has ample time within which to petition to strike or open the judgment; and

(c) In proceedings to open such a judgment, the borrower is entitled to assert all of the defenses which he would have been entitled to assert in connection with a suit instituted by summons and complaint. Also, there is no substantial appreciable difference in the burden of proof. Moreover, the borrower is entitled to present oral testimony as well as deposition testimony.

ARGUMENT.**Point I.****The Record Did Not Support the Inclusion of Consumer Borrowers With Incomes in Excess of \$10,000 in the Class of Plaintiffs Benefited by the Decree.**

As was fully demonstrated in the Statement of the Case, plaintiff offered no proof that borrowers with incomes in excess of \$10,000 did not know of and understand the confession of judgment clauses when they signed the loan instruments. Accordingly, the Court had no choice but to limit the class benefited by its injunctive decree to the class to which the proof related, viz., borrowers with incomes of \$10,000 or less.

It will be recalled that 96% of the Philadelphia delinquent debtors surveyed had family incomes of less than \$10,000; that only 30% of them had completed high school; and that only 1% of them had completed college. Thus, there was a definite correlation between the survey group's limited means and their limited educational background.

That there is a correlation between income and education is so well known that judicial notice can be taken thereof. Accordingly, the average educational attainment of borrowers with incomes in excess of \$10,000 is obviously much higher than that of the Philadelphia debtor group covered by the Caplovitz survey. It follows, therefore, that, since a more educated borrower would obviously be more likely to know of and understand a confession of judgment clause in his loan instrument than a less educated borrower, the Caplovitz survey does not constitute evidence

that borrowers with incomes in excess of \$10,000 signed loan instruments without knowing of and understanding the confession of judgment clauses. Consequently, plaintiffs have failed to sustain their burden of proof with respect to borrowers with income in excess of \$10,000.

In fact, the clear showing in the Statement of the Case, *supra*, that, since the effective date of the Truth in Lending Act, all borrowers with any real or personal property who sign loan instruments containing confession of judgment clauses have been required to receive disclosure that a security interest will be acquired in their property by virtue of the confession of judgment clause; demonstrates that all such borrowers who have borrowed money since the effective date of that Act have known of and understood the significance of these clauses.

Accordingly, both because plaintiff's proof fails to establish that borrowers with incomes over \$10,000 do not understand the significance of the confession of judgment clauses, and because the above-described Truth in Lending disclosures and the explanations by loan officers described by Casnoff and McArdle establish that borrowers are currently receiving adequate notice and explanation of these clauses, the proof does not support inclusion of borrowers with incomes in excess of \$10,000 in the class of plaintiffs benefited by the decree.

Consequently, since this Court has consistently held that a rule of constitutional law is not to be formulated "broader than is required by the precise facts to which it is to be applied", *Steamship Co. v. Emigration Commissioners*, 113 U. S. 33, 39 (1885), the record requires that any relief in this case be confined to Pennsylvania consumer debtors with income of \$10,000 and under.

Moreover, since F. R. C. P. 23(c)(3) requires the judgment in an action maintained as a class action to "include

and describe those whom the court finds to be members of the class", and since F. R. C. P. 23(c)(4)(B) provides that "a class may be divided into subclasses and each subclass treated as a class"; the Court quite properly narrowed the original class down to those as to whom plaintiffs had proven lack of understanding consent to the confession of judgment clauses, viz., consumer debtors with incomes under \$10,000.⁵

Point II.

The Record Did Not Support the Inclusion of Mortgage Loan Borrowers in the Class of Plaintiffs Benefited by the Decree.

As was pointed out in the Opinion below (at page 12), the evidence of lack of understanding of the significance of confession of judgment clauses was confined to notes incident to consumer loan transactions and consumer credit purchases of merchandise or services and did *not* include mortgage loan transactions. Mortgage loans were not even mentioned in the Caplovitz survey or in the testimony of Veney or McArdle; and Mims' only testimony concerning mortgages is favorable to the defendants; since, when she financed the purchase of her home by a purchase money first mortgage, she was represented by counsel at the settlement (N. T. 62). Furthermore, Casnoff testified that, in each instance when he represented a purchaser at a settlement following his admission to the bar on November 18,

5. As was further said by the Court below (Opinion, page 14): "There has been no showing that these plaintiffs are representative parties who fairly and adequately protect the interest of persons signing confession of judgment notes who have incomes of over \$10,000. See F. R. Civ. P. 23(a)(4). It is conceded that the holding required by this record may make it more difficult for those affected by this decision to secure credit and there is no necessity of extending such possible consequences to persons not fairly represented in the action."

1969, he explained to the purchaser the significance of the confession clause in the bond and warrant (N. T. 106); and that, in the two transactions when he represented the seller, the buyer in one instance had legal counsel, and he did not know whether the buyer in the other instance discussed the mortgage loan papers and their contents with his real estate agent or not (N. T. 100-101).

Apart from the fact that it was inadmissible since it was not responsive to the question asked and since it was objected to on that ground (N. T. 100), Casnoff's gratuitously volunteered testimony that, at the twenty-five mortgage settlements which he had attended *prior to his admission to the bar*, he had not heard the purchaser ask other than "What am I signing" and that "someone will say 'it is a bond and warrant' or . . . 'just sign it and let us get on with the transaction'", hardly establishes that the purchaser did not read and understand, or that he did not secure an explanation from his attorney or broker of the meaning of, the confession of judgment clause in the bond and warrant. Casnoff himself conceded the latter point (N. T. 108). Understandingly, the Court below commented that it did not find this testimony persuasive (Opinion, page 12).

Furthermore, as was pointed out by the Court below, mortgage loan settlements usually take place at title company offices. In a large portion, and perhaps a majority, of these settlements, the borrower is represented by an attorney; and, whether or not he is so represented, he is invariably accompanied by a real estate broker. Presumably, the confession of judgment clause is often explained to the borrower by his attorney or broker at or prior to such a settlement. Furthermore, the knowledge and understanding of the borrower's attorney and real estate broker with respect to such a confession clause is, in any event, imputable to the borrower.

Moreover, Regulation Z requires the Federal Disclosure Statement (Exhibit I-3) to notify all borrowers who own personalty that, by reason of the confession of judgment clause, a lien will be created on the borrower's personalty. Furthermore, this particular disclosure is required to be made not only in loan transactions that do not involve a mortgage, but also in loan transactions that do involve a mortgage; and loan transactions involving purchase money mortgages are not exempted from this requirement.

For all of these reasons, appellants have not carried their burden of proof with respect to mortgage loan transactions; and such transactions should, therefore, be excluded from the scope of the decree. Such a limitation is particularly appropriate, moreover, in view of F. R. C. P. 23(c)(4)(A) which provides that:

"When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues . . ."

The exemption of notes accompanying mortgages required by governmental agencies, as well as bonds and warrants accompanying mortgages, was, of course, necessary, since the only difference between the loan instrument in these two types of mortgage transactions is the descriptive designation appearing at the top of the loan instrument.*

6. If the limitation of the exemption of notes accompanying mortgages to instances when they are required by governmental agencies is deemed illogical, the obvious remedy would be to extend the exemption to all notes accompanying mortgages, whether or not required by governmental agencies. The logic of the governmental agency limitation was, of course, the fact that, in actual practice, notes are not used to any appreciable extent in mortgage loan transactions in the Commonwealth of Pennsylvania unless they are required by a governmental agency such as the Federal Housing Administration.

Point III.

Even if Appellants Had Sustained Their Burden of Proving That Borrowers With Incomes Over \$10,000 and Mortgage Borrowers Do Not Know of and Understand the Significance of Confession of Judgment Clauses in the Loan Instruments Signed by Them, the Enforcement of Such Clauses in Pennsylvania Against Said Borrowers Would Nevertheless Not Be Unconstitutional.

As demonstrated in Point I and II, appellants did not sustain either their burden of proof that borrowers with incomes over \$10,000 do not know of and understand the significance of confession of judgment clauses, or their burden of proof that mortgage loan borrowers do not know of and understand the significance of such clauses. Therefore, these two groups of borrowers were correctly excluded from the class of borrowers benefited by the injunctive decree below.

Even if appellants had sustained their said burden of proof with respect to these two groups of borrowers, moreover, the enforcement of confession of judgment clauses against them would not violate their constitutional rights, since:

(a) the negligent failure of a person who signs a contract to read its terms does not vitiate his consent to its terms;

(b) Pennsylvania Rule of Civil Procedure ("Pa. R. C. P.") 2958 precludes even the scheduling or advertising of an execution sale until twenty days after the borrower has received notice that judgment has been entered against him by confession; and, in the case of real property, delay of at least twenty-one more days is insured by Pa. R. C. P. 3130(b), which requires that the sale be advertised once a week for three weeks. In the case of personal property, delay of at

least six more days is insured by Pa. R. C. P. 3128's requirement that handbills be posted six days before the sale of personalty;⁷ and

(c) during these delay periods, the borrower has ample opportunity to petition to strike or open the judgment.

In this latter connection, it should be first noted that, in *American Surety Co. v. Baldwin*, 287 U. S. 156, 53 S. Ct. 98 (1932), this Court sustained a judgment against a surety entered without notice pursuant to a confession of judgment clause in a supersedeas bond, on the grounds: (a) that the surety's act in signing the supersedeas bond constituted "consent" to the confession of judgment clause; and (b) that the entry of judgment was followed by adequate opportunity for a hearing as to its correctness. The Court did not concern itself with, and made no finding with respect to, the question whether the surety had read the bond and learned of and understood the significance of the confession of judgment clause. Nor did it discuss the question whether there had been a change in the burden of proof. The Court said (at page 168):

"The practice prescribed was constitutional. Due process requires that there be opportunity to present every available defense; but it need not be before the entry of judgment . . . An appeal on the record which included the bond afforded an adequate opportunity. Thus the entry of judgment was consistent with due process of law."

Similar holdings; sustaining judgments entered by confession, include: *Turner v. Alton Banking & Trust Co.*, 181

7. See also Pa. R. C. P. 3129(a), which requires that handbills be posted at least ten days before the sale of real property.

F. 2d 899, 905 (8 Cir. 1950); *Bower v. Casanave*, 44 F. Supp. 503, 507 (S. D. N. Y. 1941); and *Levin v. Wenof*, 7 N. J. Misc. 664, 146 Atl. 789 (1929).

Other cases, in which judgments entered without notice were sustained when there was notice and opportunity to present a defense prior to execution, include: *Coffin Bros. & Co. v. Bennett, Superintendent of Banks for State of Georgia*, 277 U. S. 29, 48 S. Ct. 422 (1928) (assessment against stockholders of insolvent bank); *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 596-7, 51 S. Ct. 608 (1951) (income tax assessment); *Jordan v. American Eagle Fire Ins. Co.*, 169 F. 2d 281 (App. D. C. 1948) (administrative order fixing insurance rates). Cf. *Bianchi v. Morales*, 262 U. S. 170, 43 S. Ct. 526 (1923) (summary mortgage foreclosure proceeding, in which payment was the only defense permitted to be asserted, held constitutional, since a separate suit could be brought to annul the mortgage by reason of any other defense). In none of these decisions did the Court in any way indicate that the burden of proof must be the same in the post-judgment proceeding as it would have been if the plaintiff had proceeded by summons and complaint.

Appellants rely heavily on *Armstrong v. Manzo*, 380 U. S. 552, 85 S. Ct. 1187 (1965), in which post-judgment opportunity for a hearing with respect to an adoption decree entered without notice was held unconstitutional because there had been a complete change in the burden of proof. This case is distinguishable, however, since: (a) the element of advance consent supplied by the signing of a contract containing a confession of judgment clause was lacking; and (b) the entry of the decree without notice violated even the applicable state procedures.

Most important of all, however, there is no appreciable difference between the burden of proof imposed in Pennsylvania upon a debtor who seeks to open a judgment entered

pursuant to a confession of judgment clause in a note or mortgage bond and that which would have been imposed upon him had he been sued on summons and complaint. Even in a suit instituted by summons and complaint, all of the available defenses other than that of forgery are affirmative defenses and, therefore, the burden of proof is on the debtor. That the defendant in an action instituted by summons and complaint has the burden of proof with respect to each issue which he is required to plead as an affirmative defense is definitely the law in Pennsylvania. *O'Neill v. Metropolitan Life Ins. Co.*, 345 Pa. 233, 239 (1942). Accordingly, since Pennsylvania Rule of Civil Procedure 1030 requires each of the following defenses to be pleaded as an affirmative defense, the defendant has the burden of proof with respect to each of them:

“All affirmative defenses, including but not limited to the defenses of accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, laches, license, payment, release, res judicata, statute of frauds, statute of limitations and waiver.”

Pennsylvania cases and statutory provisions which have imposed the burden of proof upon the defendant with respect to various defenses include, *inter alia*: *Levin v. Northwestern Bank*, 154 Pa. Super. 94 (1943) (defense of payment); *Killeen's Estate*, 310 Pa. 182 (1932) (defense of fraud with respect to non-negotiable note); *Smith v. Lenchner*, 204 Pa. Super. 500, 505 (1964) (defense of lack of consideration, with respect to sale of non-negotiable note); 12A *Purd. Penna. Stats.* (Uniform Commercial Code) §3-307(2) (“when signatures [on a negotiable or non-negotiable promissory note] are established, production of the instrument entitles a holder to recover on it unless the

defendant establishes a defense").⁸ Furthermore, compare 12A Purd. Stats. § 3-307(1), which provides that:

"(1) Unless specifically denied in the pleadings each signature on an instrument is admitted. When the effectiveness of a signature is put in issue

(a) the burden of establishing it is on the party claiming under the signature; but

(b) the signature is presumed to be genuine or authorized except where the action is to enforce the obligation of a purported signer who has died or become incompetent before proof is required."

Thus, with the sole exception of the defense of forgery, all other defenses, including even those of lack of consideration, payment, breach of warranty, or fraud, are on the defendant in an action instituted on summons and complaint on a negotiable or non-negotiable promissory note or bond. Furthermore, even in the case of the defense of forgery, there is a presumption of authenticity unless the purported signer has died or become incompetent before proof is required. Bearing in mind the fact that the defense of forgery is rarely asserted, the slight difference in the burden of proof with respect to the defense of forgery is not such a substantial difference as to render the entire post-judgment procedure for opening judgments entered by confession against a defendant who negligently failed to read the confession of judgment clause an inadequate remedy from the constitutional standpoint. Moreover, even if this difference were deemed substantial, it should not affect cases where the debtor does not contend that his signature was forged.

8. According to the official comment under § 3-307(2):

"Once signatures are proved or admitted, a holder makes his case by mere production of the instrument, and is entitled to recover in the absence of any further evidence. The defendant has the burden of establishing any and all defenses, not only in the first instance, but by a preponderance of the total evidence."

The only other burden which the Court found is imposed upon the signer of a judgment note in connection with a petition to open it, which would not have been imposed on him had he been sued on complaint and summons, is an alleged increase in court costs and attorneys' fees. Actually, this alleged increase was not proven, since: (a) the legal expense and court costs incurred in opening the judgment would usually generate savings in the subsequent proceedings; and (b) in any event, all of the court costs would be payable by the plaintiff if the defendant prevailed. With respect to the first of these two points, not only would the depositions taken in connection with the petition to open serve the function of providing evidence to be considered by the Court in ruling on the petition to open the judgment, but also they would afford the defendant the benefits of pre-trial discovery prior to the hearing on the merits. Furthermore, to the extent that they were taken from parties or unavailable witnesses, these depositions could be used at the trial. Lastly, had a study been made of proceedings to open judgments entered by confession, it would undoubtedly have been found that, once the debtor succeeded in opening the judgment, the matter was generally adjusted by agreement of the parties without the necessity of a final trial or hearing. In this connection, the analogy of preliminary injunction hearings, which are rarely followed by final injunction hearing, is instructive.

Furthermore, even if we assumed that the alleged increased expense had been proven, the debtor's consent to the confession clause, which consent necessarily flowed from his voluntary act in signing the judgment note or other loan instrument which contained it, would more than validate any such increase in expense, even if the debtor negligently failed to read the note or loan instrument when he signed it. *National Equipment Rental, Ltd. v. Szukhent*, 375 U. S. 314, 84 S. Ct. 411 (1964), clearly so held, with respect to a printed

clause in a printed form of farm equipment lease to the effect that service of process upon a nominee of the lessor in the lessor's state would constitute valid service of process upon the lessee in any ~~act~~ pertaining to the lease. Even though the lessee contended that he had not read the foregoing clause, even though his testimony in this regard was apparently uncontradicted, and even though the defense of the action in the lessor's state would impose substantial additional expense on the lessee, the Court held that his act in signing the lease constituted a valid waiver of his constitutional right to be personally served with process in the forum state.⁹ Justices Black and Brennan dissented on the ground that, since the lessee had not read the clause, his conduct in signing the lease did not constitute a valid waiver of his aforesaid constitutional right.

For a similar decision, in which the Court held that a judgment entered by confession on a judgment note was not invalidated by the mere fact that the borrower had negligently failed to read the confession of judgment clause, see *Chester Valley Refrigeration Co. v. Altieri*, 41 Pa. D. & C. 2d 90 (C. P. Monroe Co. 1965). As was said by the Court in that case:

" . . . it is supine negligence not to read the paper before signing it, and hence one who can read it or has

9. It should be noted also that the *Szukhent* case is contra to plaintiff's argument that if (as plaintiff contends in this case) borrowers are unable to obtain loans in which the loan instrument does not contain a confession of judgment clause, the element of "consent" is thereby vitiated. See Justice Black's dissenting opinion, in which he stated that "it is hardly likely that these Michigan farmers were in a position to dicker over what terms went into the contract they signed". Moreover, since Casnoff testified that his finance company employer "had dropped judgment notes out of a considerable part of its sales finance transactions" and "is prepared to drop judgment notes completely out of its consumer discount transactions" (N. T. 116), the record affirmatively establishes that loans evidenced by loan instruments which do not contain confession of judgment clauses are obtainable.

an opportunity to get others to do so for him, cannot be heard to say he was not permitted to or did not or could not read it, or that he did not understand or was mentally incapable of understanding its contents (except where, in the latter instance, he gives facts showing an impaired mentality), unless by false representations, trick or fraud, calculated to deceive a man of his intelligence, and definitely and distinctly established, he was hurriedly misled into signing it without reading”

Plaintiffs have additionally contended that the petitioner is permitted to present only deposition testimony and not live testimony at the hearing on the petition to open. Plaintiffs are in error. As is provided by Pa. R. C. P. 2959(c):

“The Court shall dispose of the rule [to show cause why judgment shall not be opened] on petition and answer, and on any testimony, depositions, admissions, and other evidence. [Emphasis added.] .

For an illustrative case, where deposition testimony was supplemented by live testimony at the hearing on the petition to open, see *Gagnon v. Speback*, 383 Pa. 359 (1955).

This Court's decision invalidating a wage attachment effected without opportunity for prior hearing, in *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969), upon which plaintiffs relied in the proceedings below, is, of course, distinguishable, since:

(a) this Court took care to point out that it was not invalidating non-consensual pre-hearing attachment of other forms of property and that its decision was based solely on the extreme hardship that a wage attachment inflicts on a wage-earner who has no other means of support;

(b) wage attachment or garnishment is forbidden in Pennsylvania, both before and after entry of judgment; and

(c) the element of consent, which was lacking in *Sniadach*, is supplied by the borrower's act in signing the loan instrument.

Moreover, this Court's decision invalidating the termination of relief payments prior to opportunity for hearing, in *Goldberg v. Kelly*, 397 U. S. 254 (1970), also relied on by plaintiffs in the proceedings below, was based on the same principle as *Sniadach*, i.e., that a person's sole source of income may not be cut off from him without prior opportunity for hearing or consent.

CONCLUSION.

Lack of understanding consent to the confession of judgment clauses has not been proven with respect to the two classes excluded from the class benefited by the decree below, viz., borrowers with incomes in excess of \$10,000 and mortgage loan borrowers. Moreover, even if they negligently failed to read the confession of judgment clauses, this would not vitiate the element of consent supplied by their voluntary action in signing the loan instruments, even if there was a substantial increase in the burden of proof and legal expense imposed on them in connection with efforts by them to assert a defense. Furthermore, there was no substantial increase either in the said burden of proof or in the said legal expense.

Respectfully submitted,

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Of Counsel:

BLANK, ROME, KLAUS & COMISKY.

APPENDIX.

FEDERAL DISCLOSURE STATEMENT As Required by THE FEDERAL TRUTH IN LENDING ACT AND REGULATION Z

BORROWER'S NAME(S) AND ADDRESS		LENDER'S NAME AND ADDRESS	
LOAN NUMBER	DATE	DATE FINANCE CHARGE BEGINS TO ACCRUE IF OTHER THAN DATE OF LOAN	
AMOUNT FINANCED	FINANCE CHARGE (See below)	ANNUAL PERCENTAGE RATE %	
\$	\$	\$	\$
TOTAL OF PAYMENTS	TOTAL PAYABLE IN CONSECUTIVE MONTHLY INSTALLMENTS	DUE DATE OF PAYMENTS	AMOUNT OF FIRST PAYMENT
\$	\$	\$	\$
INTEREST OR DISCOUNT	SERVICE CHARGE	FEE	CHARGES INCLUDED IN THE FINANCE CHARGE
\$	\$	\$	\$

SECURITY

- ☐ This Loan is Unsecured.
- ☐ The Borrowers hereby grant a Security Interest to the Lender in the property described below, the proceeds thereof, and all after acquired property of the same character, to secure this and any future loan.
- ☐ (a) All of the household goods and appliances of every kind, now located in or about the borrower's premises at their address above stated.
- ☐ (b) Motor Vehicles(s): Year and Make _____ Serial No. _____
- ☐ (c) Other (describe) _____

☒ (d) The real estate used as the Borrowers' principal residence at their address above stated, or as described in the following:

☐ REBATE FOR PREPAYMENT. If the loan contract is prepaid before the final installment date, the borrower shall receive a rebate of a portion of the finance charge under the Rule of 78's, or as specified in the following _____

☐ DEFAULT CHARGE: If interest is precomputed, (in the Finance Charge) and any scheduled payment or the loan is in default for _____ days after such due date, a Default Charge of _____ of the installment(s) in default may be collected.

☐ *FINANCE CHARGE: If interest on this loan is not precomputed, the Finance Charge is computed on outstanding unpaid principal balances on the basis that installments shall have been paid according to contract.

PROPERTY INSURANCE, if written in connection with this loan, may be obtained by the borrower through any person of his choice. If borrower desires property insurance to be obtained through the creditor, the cost will be as indicated above.

CREDIT LIFE AND DISABILITY INSURANCE is not required to obtain this loan and no insurance is provided unless a charge therefor is indicated above.

I hereby, voluntarily elect to purchase Insurance, the type and cost of which is indicated above. I hereby acknowledge that the cost of insurance was disclosed to me in writing before signing this statement.

DATE _____ WITNESS _____ INSURED _____

This statement has been prepared for use in more than one jurisdiction. Only those boxes checked or information typed in are applicable to this jurisdiction. It is not the Lender's intent to include any items of disclosure forbidden by the laws of this jurisdiction.

I ACKNOWLEDGE RECEIPT OF A COMPLETED COPY OF THIS STATEMENT BEFORE THE LOAN WAS CONSUMMATED.

BORROWER _____

NOTICE OF RIGHT OF RESCISSION

CUSTOMER'S NAME(S)	DATE OF LOAN
	LOAN NUMBER

Notice To Customer Required By Federal Law:

You have entered into a transaction on _____ which
(Date)

may result in a lien, mortgage, or other security interest on your home. You have a legal right under federal law to cancel this transaction, if you desire to do so, without any penalty or obligation within three business days from the above date or any later date on which all material disclosures required under the Truth in Lending Act have been given to you. If you so cancel the transaction, any lien, mortgage, or other security interest on your home arising from this transaction is automatically void. You are also entitled to receive a refund of any downpayment or other consideration if you cancel. If you decide to cancel this transaction, you may do so by notifying

_____ (Name of Creditor)

at _____ (Address of Creditor's Place of Business)

by mail or telegram sent not later than midnight of _____ (Date)

You may also use any other form of written notice identifying the transaction if it is delivered to the above address not later than that time. This notice may be used for that purpose by dating and signing below.

I hereby cancel this transaction

_____ (Date) _____ (Customer's Signature)

The undersigned customer(s) acknowledge receipt of two completed copies of this notice on this date _____

(Customer's Signature)

(Customer's Signature)

See reverse side for important information about your right of rescission.

CREDITOR'S COPY

EFFECT OF RESCISSION. When a customer exercises his right to rescind under paragraph (a) of this section, he is not liable for any finance or other charge, and any security interest becomes void upon such a rescission. Within 10 days after receipt of a notice of rescission, the creditor shall return to the customer any money or property given as earnest money, downpayment, or otherwise, and shall take any action necessary or appropriate to reflect the termination of any security interest created under the transaction. If the creditor has delivered any property to the customer, the customer may retain possession of it. Upon the performance of the creditor's obligations under this section, the customer shall tender the property to the creditor, except that if return of the property in kind would be impracticable or inequitable, the customer shall tender its reasonable value. Tender shall be made at the location of the property or at the residence of the customer, at the option of the customer. If the creditor does not take possession of the property within 10 days after tender by the customer, ownership of the property vests in the customer without obligation on his part to pay for it.

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JUN 3 1971

E. ROBERT SEAVER, CLERK

IN THE
Supreme Court of the United States

October Term, 1970

No. ~~500~~

70-6

NELLIE SWARB et al.,
Appellants

v.

WILLIAM M. LENNOX et al.,
Appellees

On Appeal from the United States District Court for the
Eastern District of Pennsylvania

**MOTION OF THE PENNSYLVANIA CREDIT UNION
LEAGUE FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

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IN THE
Supreme Court of the United States

October Term, 1970

No. 538

NELLIE SWARB et al.,
Appellants

v.

WILLIAM M. LENNOX et al.,
Appellees

On Appeal from the United States District Court for the
Eastern District of Pennsylvania

**MOTION OF THE PENNSYLVANIA CREDIT UNION
LEAGUE FOR LEAVE TO FILE BRIEF AS
AMICUS CURIAE**

THE PENNSYLVANIA CREDIT UNION LEAGUE respectfully moves this Court for leave to file a brief in this case as *amicus curiae*. The consents of the attorneys for the corporate appellees have been obtained; the consent of the Attorney General for the Commonwealth of Pennsylvania has been obtained; the consent of the City Solicitor of the City of Philadelphia has not been obtained; the consents of the attorneys for the appellants, Nellie Swarb et al., have been denied.

The applicant, the Pennsylvania Credit Union League, has an interest in this case in that the applicant is a non-profit association of federal credit unions, chartered under the Federal Credit Union Act, 12 U.S.C. 1751 et seq., and state credit unions chartered under the Pennsylvania Credit Union Act, 15 P.S. 12301 et seq. The membership of the Pennsylvania Credit Union League consists of

1,329 federal credit unions and 121 state credit unions with a combined individual membership of 983,146 persons, and assets of \$678,977,622.00. The decision in this case will have an immediate effect on the credit unions in Philadelphia—307 federal and 30 state credit unions with individual memberships of 247,638 persons, and assets of \$174,204,940.00.

The interests of federal and state-chartered credit unions are not represented in this action, and their statutory organization, purposes and powers differ from those of any other party to this suit. Both federal and state credit unions are membership organizations empowered by law to receive the savings of their *members only* and to make loans to *members only*; provided, however, that such loans are limited "for provident or productive purposes." Unlike any of the corporate appellees in the instant matter, credit unions are not permitted to engage in credit transactions with the public at large, but are limited to dealing with their members.

So far as applicant has been able to determine, none of the named or intervening defendants below has filed a cross appeal or intends to appear in this court. However, even if the named or intervening defendants do respond on the merits, their interests are not representative of the interests of the applicant.

Applicant submits that the question presented to the Court for decision has not been well defined. In their jurisdictional statement, at page 3, appellants have stated as follows:

"The question presented on this appeal is whether the confession of judgment mechanism as applied to natural persons whose annual individual or conjugal incomes are more than or equal to \$10,000.00 and natural persons who have signed mortgages accompanied by bonds and warrants, or notes required by government agencies, is in violation of the due proc-

ess clause of the 14th Amendment of the United States Constitution."

The question thus stated presents to this Court the question of the validity or reasonableness of the exceptions established by the court below to its injunction against entry of judgments by confession and executions on judgments thus entered.

On the other hand, under date of May 6, 1971, the attorney for the appellants, in a letter to the Honorable William J. Brennan, Jr., stated the question differently:

"The appellants' appeal is not, as the appellees suggest, limited to the mortgage exception and the income exception. Our contention is that the court below erroneously declared the confession of judgment procedure unconstitutional only as applied to certain individuals under certain conditions rather than, as appellants urged below, declaring the procedure unconstitutional on its face."

Thus, stated, the question before this Court is the constitutionality of the challenged Pennsylvania statutes and rules of procedure relating to confessions of judgment, as a fundamental matter, rather than the issue of the validity or reasonableness of the exceptions to the injunctive order of the court below. Applicant respectfully submits that its interests and the interests of its constituent members will be so vitally affected by the decision of the Court in this case that equity demands that these interests be represented as to the far-reaching constitutional issues involved.

Moreover, the court below considered, in passing, the protective provisions of Regulation "Z" (12 C.F.R. 226 ff) enacted pursuant to the provisions of Title I of the Consumer Credit Protection Act of 1968 (15 U.S.C. 1601 et seq.) the short title of which is the Truth-in-Lending Act.

Applicant believes that the court below failed to recognize the true effect of the Truth-in-Lending Act and Regulation "Z" and that the credit unions comprising the membership of the Pennsylvania Credit Union League, as well as the individuals comprising their membership, will be seriously prejudiced thereby.

Applicant respectfully submits that it can be of assistance to the Court in consideration of other aspects of the subject matter, including the use of judgments by confession as security devices, rather than remedial measures; and the guarantee of due process through adequate legislation and rules of procedure.

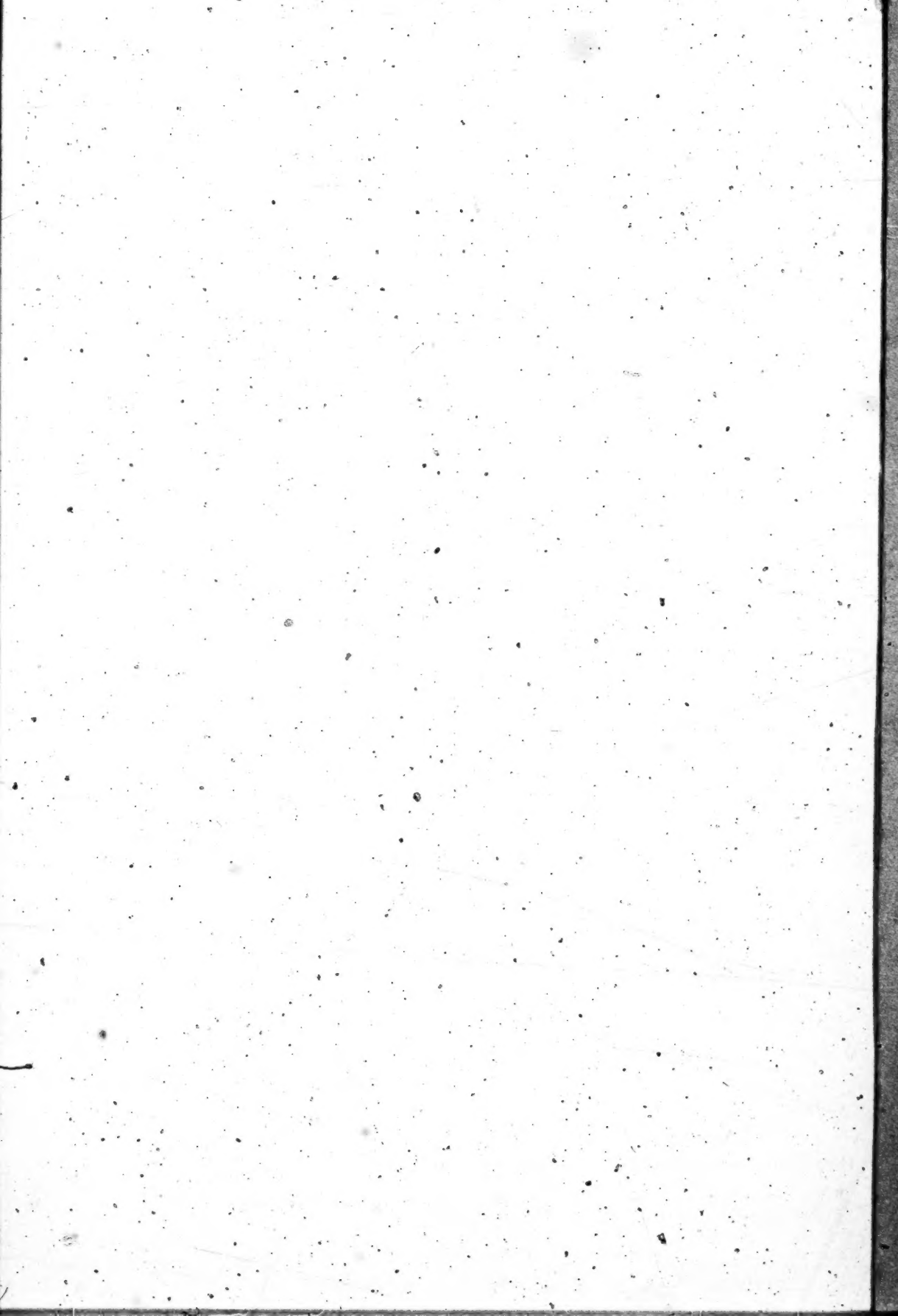
Credit unions have historically served the purpose of providing the consumer, who has traditionally been denied credit from conventional sources, a place where he could save his money at a fair rate of return and where he could find a source of credit at reasonable rates and on terms consistent with his ability to repay. Therefore, applicant submits that the interests of persons situated as aforesaid, as represented by the Pennsylvania Credit Union League, should properly be before this Court in its consideration of the fundamental and far-reaching constitutional issues involved in this case.

WHEREFORE, applicant prays Your Honorable Court for leave to file its brief as an *amicus curiae*.

Respectfully submitted,

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1970

No. 598

70-6

HELLIE SWART, et al., Appellants,

VS.

WILLIAM M. LENNOR, et al., Appellees.

**On Appeal From the United States District Court
For the Eastern District of Pennsylvania**

**BRIEF OF CALIFORNIA RURAL LEGAL ASSISTANCE, ET AL.,
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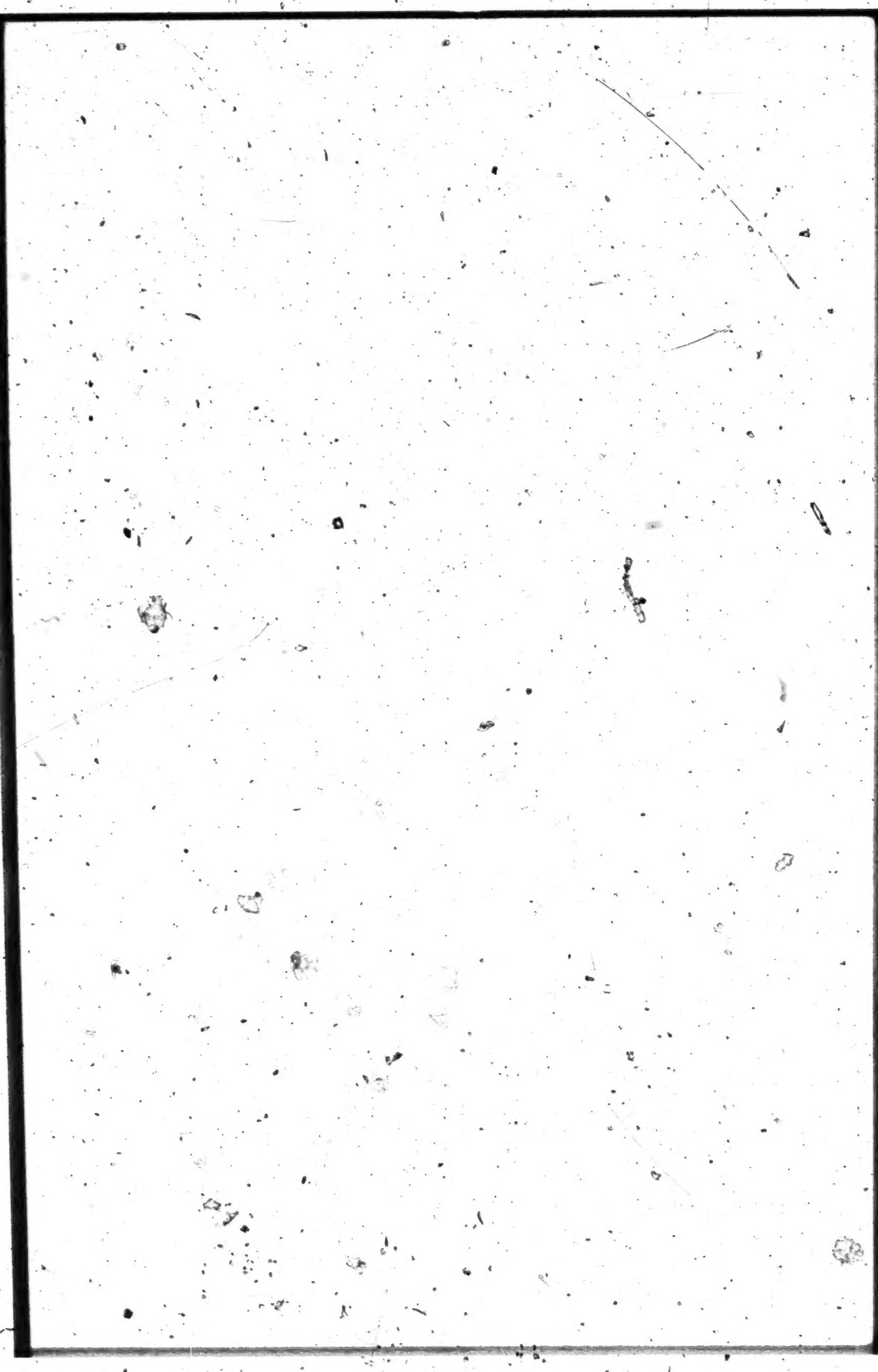
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34	Chapter XXXIII. The Law of the Communication
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<u>Commentaries</u>	<u>Pages</u>
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92 C.J.S. 1055-1060	25
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Hopson, "Cognovit Judgment: An Ignored Problem of Due Process and Full Faith and Credit," 29 U. Chi. L.R. 111, 126-136 (1961).	19



INTEREST OF THE AMICI CURIAE

I. FACTUAL CIRCUMSTANCES OF AMICI.

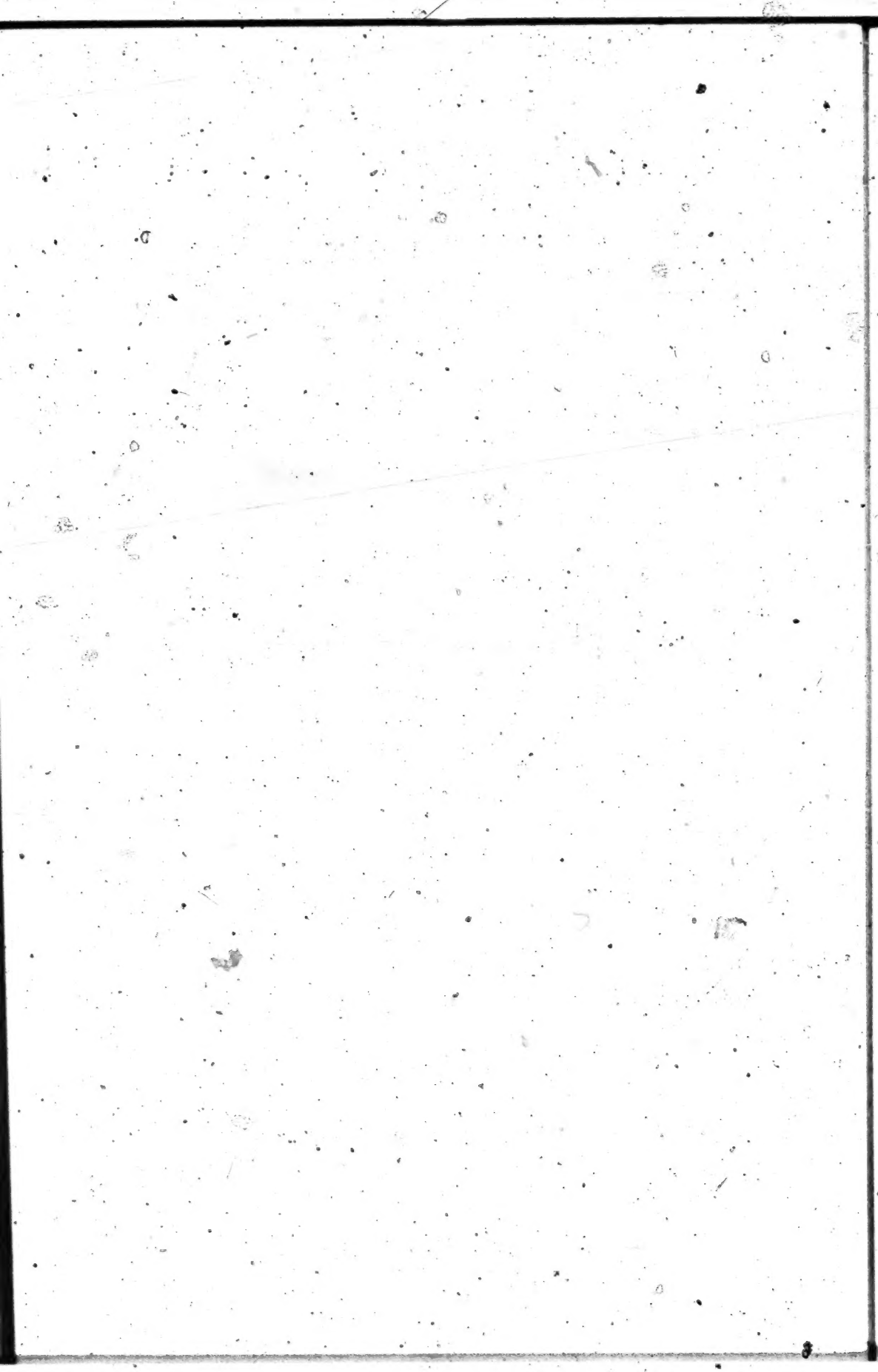
Swarb involves clauses written into consumer contracts confessing judgment thereon.¹ Amici are concerned with confessions not only in that context, but also where signed separately from the contract after an alleged default. Amici Babcock and Nunez are persons who have executed confessions of judgment in favor of a collection agency, H.P. Sears and Company, of Bakersfield, California. Amicus Sophia Babcock is a Greek immigrant who speaks broken English and reads English not at all. Her earnings as a waitress average about \$45 per week.² The debt on which Mrs. Babcock confessed judgment was incurred by her husband long after he deserted her. It is therefore one of which California law absolves her -- although, of course, Sears' employees have never so informed her.³ After its employees visited

1. Hereinafter, such clauses will be described as "cognovits."

2. After the events herein related, amicus Babcock was injured in an accident as a result of which she was unable to continue work. Her sole income at this point derives from Workmen's Compensation payments.

3. "The earnings...of the wife are not liable for the debts of the husband... [except for necessities furnished him] while they are living together..." Cal.Civ.Code §5117 (emphasis added).

(Continued next page)



her home and several times called her late at night, Mrs. Babcock was persuaded to go to Sears' office. In the course of the ensuing lengthy conversation, she was presented with the confession of judgment. She was told only that this was "needed for our files" and that its execution would settle the matter so that she would receive no further phone calls. Two weeks later it was filed and judgment taken against her in the Bakersfield Municipal Court.⁴

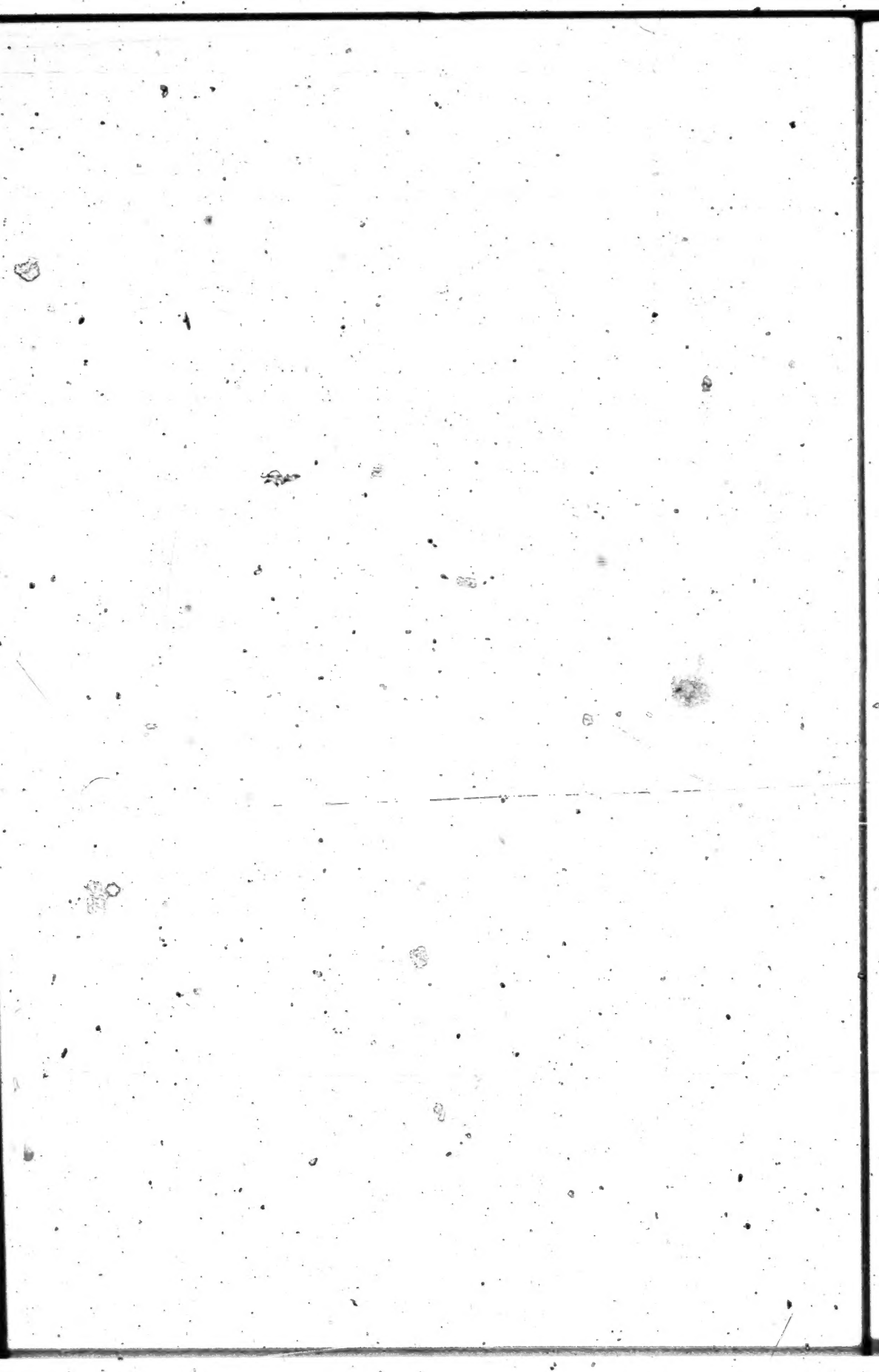
Amicus Nunez was called to an Order of Examination⁵ handled by a lay employee of H.P. Sears, who thereafter demanded that Nunez sign a confession of judgment as to several entirely unrelated debts. Since Mr. Nunez neither speaks nor reads English he was accompanied by his job counselor from the California State Department of Human Resources Development who undertook to translate the confession for him. Unable to translate it because she herself did not understand its meaning, the

(Footnote 3 continued)

"The earnings and accumulations of the wife...while she is living separate from her husband, are the separate property of the wife." Cal.Civ.Code §5118.

4. Research by amici indicates that in the space of a 10-month period H.P. Sears and Co. filed 131 confessions of judgment in the Bakersfield Municipal Court.

5. A California post-judgment procedure whereby a court orders a judgment-debtor to appear and answer questions directed to him by the plaintiff or his representative as to income, assets, etc.



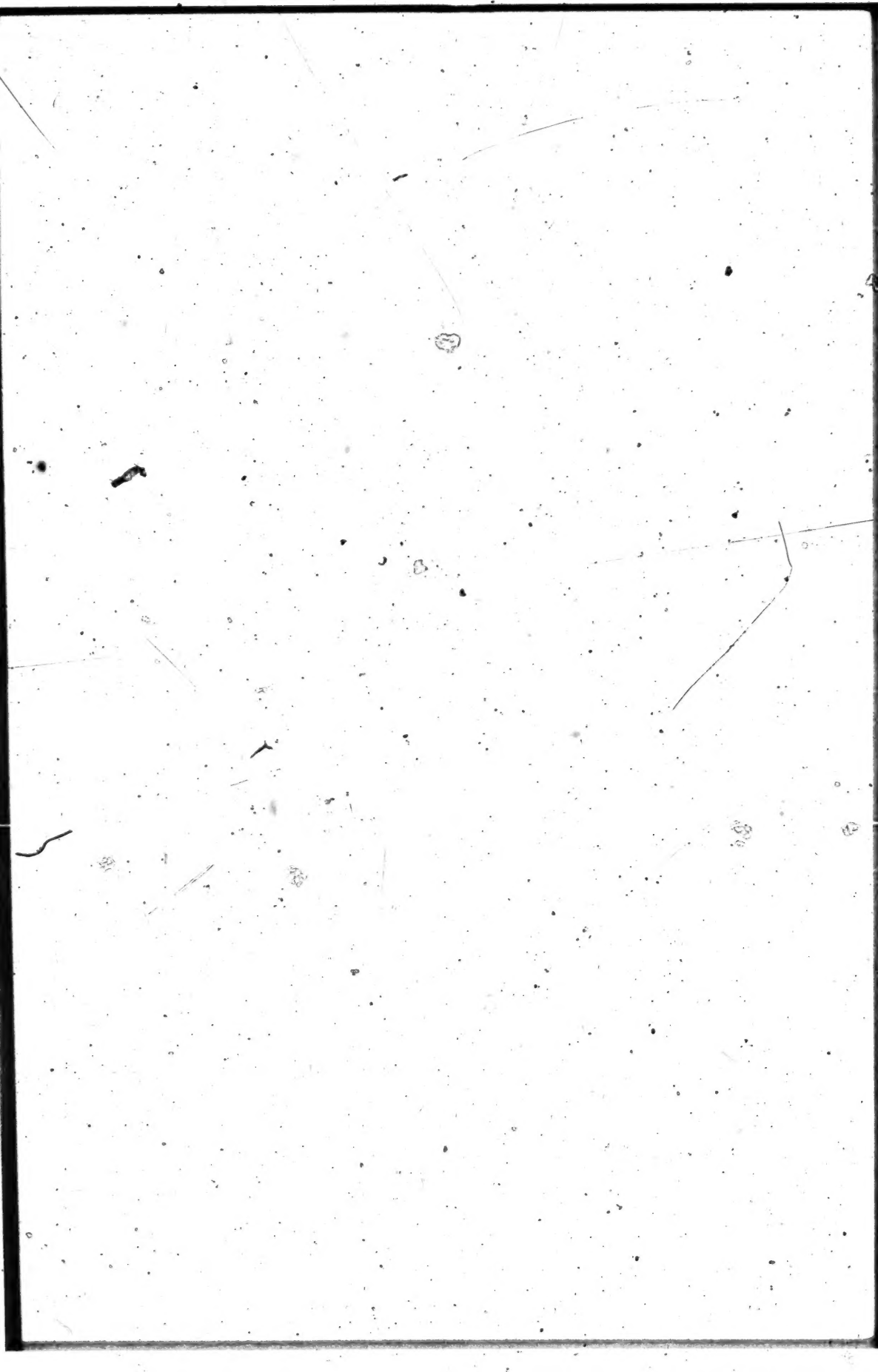
translator asked Sears' employee to explain it to her. He replied, in words or in substance, "I take the Fifth Amendment." He told Mr. Nunez that refusal to sign would result in litigation and taxation of court costs -- but did not mention that two of the three alleged debts were barred by the statute of limitations and the other was one which collection agencies are forbidden by California law to litigate.⁶ Unaware of this, and unfamiliar with American law and procedure, Mr. Nunez signed the confession because (as he explained later to his attorneys) "If you go to court there is lots of trouble and you might have to go to jail." Although Mr. Nunez, who is on welfare, has been unable to pay anything on the alleged obligations -- and has been instructed by his attorneys not to do so -- the confession has never been filed.

6. The confession signed by amicus Nunez is attached hereto as Exhibit B. The two debts in question include the bill from attorneys Donahue and Goodsell which is over three years old and two from the Kern County Hospital, one of which is over six years old.

Cal.Welf.& Inst.C. §17300 requires that county hospital bills be collected by public officials rather than referred to collection agencies. On at least twenty-five occasions attorneys for amici CRLA and/or BAKERSFIELD have interposed demurrers in cases in which H.P. Sears attempted to collect hospital debts and each such demurrer has been sustained upon Sears' failure to file a response.

Finally, under Cal.W. & I. C. §17300 only persons who were not indigent at the time the services were rendered and are not

(Continued next page)



Amici Greater Bakersfield Legal Assistance, Inc., and California Rural Legal Assistance, Inc., (hereinafter BAKERSFIELD and CRLA respectively) are legal services programs funded by the United States Office of Economic Opportunity to provide legal assistance to indigent individuals in the communities they serve. Each program has clients who have executed confessions of judgment in favor of H.P. Sears or other collection agencies. Not one such client received any explanation of its legal significance before signing the confession of judgment, nor were any of them otherwise aware of the significance of what they were signing. In many cases -- including all where H.P. Sears and Company was involved -- the signers were more or less actively misled to believe that they were merely

(Footnote 6 continued)

now indigent are liable for county hospital bills. Moreover suit can be initiated only upon a request by the Board of Supervisors for the county counsel to do so. Thus it has been held that both indigency and the board of supervisors' request must be specifically alleged and proven before judgment can be had for a county hospital bill. Santa Barbara County v. Monical, 10 C.A.3d 249, 254, 88 C.R. 717, 720 (1970).. Needless to say Mr. Nunez' confession contains none of these allegations, perhaps out of oversight, more probably because they could not truthfully be alleged. Whatever the reasons, however, the confession would clearly be legally insufficient to support a judgment -- if there were some way to bring its deficiencies to the attention of the trial court, that is.

complying with some procedural formality of the collection agency.⁷

7. Amici Berkeley Neighborhood Legal Services, Legal Aid Society of San Mateo County, San Francisco Neighborhood Legal Assistance Foundation, Tulare County Legal Services Association, Legal Services Centers of Ventura County, Legal Aid Society of San Joaquin County and Legal Aid Society of Marin County are legal services programs funded by the Office of Economic Opportunity. Although none of them have clients who have executed confessions of judgment in favor of H.P. Sears, they join in the sentiments expressed in this brief.

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II. THE LAW OF CONFESSION OF JUDGMENT IN CALIFORNIA

Although California's law of confession of judgment is conceptually identical to Pennsylvania's, the surrounding procedures are rather different. California law contains no provision requiring notice to the defendant of the entry of a judgment by confession. Only if the defendant becomes aware of its entry can he move to have it set aside, the grounds being excusable neglect, mistake or intrinsic or extrinsic fraud which prevented the presentation of a colorable defense. While at first blush this might seem a far less onerous procedure than Pennsylvania's, its practical effect is much the same, particularly for the indigent defendant. A defendant served in the normal fashion with a summons and complaint may put the matter at issue by stating his defense in a simple answer --, which he may even do orally to the clerk of the court. After judgment has been entered by confession, the defendant (even if he understood the esoteric legal principles involved) will need the aid of an attorney in drafting the papers necessary to set it aside.

California law forbids the inclusion of confessions of judgment in a number of the kinds of contracts involved in Swarb, e.g., retail installment sales,⁸ loans made by personal property brokers,⁹ and other loan companies.¹⁰ (It will be remembered that the confessions of judgment signed by amici were obtained exclusive of, and after the alleged default on, the contracts involved.) On the other hand, landlords, doctors, clinics, hospitals and purveyors of many other goods and services in California are not restricted in requiring confessions in any contracts which they make.

8. Cal.Civ.Code §§1804.1(c), 2983.7(b).

9. Cal.Fin.Code § 22009.

10. Cal.Fin.Code §§24208, 18003.

SUMMARY OF ARGUMENT

I. The right to an opportunity for a hearing is not waivable because that right is of the essence of due process and the adversary system without which a court cannot operate. A procedure which results in denial of any opportunity for a defendant to appear is so inherently subject to abuse as to be constitutionally impermissible. A waiver of procedural rights made long previous to judicial proceedings, and for reasons extraneous to those proceedings, is invalid. Courts exist to dispense justice without regard to wealth or poverty, not to effectuate the distress sale purchase of the procedural rights of the poor by the rich.

II. A confession of judgment cannot evidence a constitutionally valid waiver: (1) because defenses may have arisen since its execution which were not known and understood by the waiving party at that time; (2) because the waiving party may not have understood his extant rights and defenses at the time he executed the confession; (3) because the waiving party may not have understood what the confession was. Since the purpose of a confession is to avoid any appearance by the waiving party, confession is necessarily antithetical to the individualized scrutiny which is required to validate any waiver of appearance or counsel. Pennsylvania has adopted a procedure for accepting waivers of constitutional rights which fails to provide even minimal assurance that such waivers are knowing, understanding and voluntary.

ARGUMENT

I. THE RIGHT TO AN OPPORTUNITY TO APPEAR
WHETHER FOR THE PURPOSE OF DEFENDING OR
WAIVING IS SO FUNDAMENTAL TO DUE PROCESS
THAT IT CANNOT BE WAIVED IN A CONFESSION
OF JUDGMENT.

Courts and commentators have sometimes endorsed the sweeping statement that all constitutional rights are subject to waiver.¹ In considering such statements it is necessary to note the vast differences between the contexts in which they are generally made and the context of confession of judgment. Almost invariably, such statements appear in cases in which a criminal defendant, having acquiesced in a procedure throughout his trial, seeks to object to it after judgment has been rendered against him. Thus the waiver or waivers involved will have been made after full opportunity to appear and defend. Such waivers having been made by the defendant in person, the court will have been able to make some assessment of his English and ability to comprehend our procedures -- unlike a confession, whose signatory may be uneducated and either completely illiterate, or, like amici Babcock and Nunez, illiterate in English. Since such waivers are made in open court before a disinterested judge, there is no question of immediate coercion, mental overbearing or misleading -- unlike the signatory to a confession whose only counsel will have come from adverse parties who, by the very

1. See e.g., 28 Am.Jur.2d 846-850, 92 C.J.S. 1066 - 1068 and cases there cited.

act of obtaining a confession, are insulating their conduct from scrutiny. Such waivers are accepted only after the defendant has received an explanation of the rights he is foregoing -- unlike a confession whose signatory may have no knowledge of his rights at the time of execution and who is waiving an opportunity to present even those defenses which arise long after signing.

Even with all the safeguards which accompany normal (i.e., non-confessional) waivers, the law, as we shall see, is extremely chary of them. Nevertheless, when all those safeguards are present, the defendant is properly precluded from tardily attacking a judgment rendered against him.

"Any other course would not comport with the standards for the administration of criminal justice. We cannot permit an accused to elect to pursue one course at the trial and then, when that has proved to be unprofitable, to insist on appeal that the course which he rejected at the trial be reopened to him. However unwise the first choice may have been, the range of waiver is wide. Since the protection which could have been obtained was plainly waived, the accused cannot now be heard to charge

the court with depriving him of a fair trial. The court only followed the course which he himself helped to chart and in which he acquiesced until the case was argued on appeal."²

Those considerations notwithstanding, it is clear that there are some rights that simply cannot be waived, even with full understanding and capacity and the advice of counsel. Perhaps the most obvious are those created by the Thirteenth Amendment. No one would seriously suggest that a creditor could enforce a contract whereby a debtor pledged himself into peonage or involuntary servitude in the event of a default. The same is true of the prohibition of cruel and unusual punishment. One might imagine a criminal defendant emphasizing his innocence and horror of the crime involved by dramatically volunteering to accept death via the auto-da-fe if convicted. But a court could not subsequently impose such a penalty on the ground that the defendant had waived the Eighth Amendment. And this Court has squarely held that there can be no waiver by failure to object, or a criminal defendant's right not to be tried under an ex post facto law. Crain v. United States, 162 U.S. 625 (1896), disapproved on other grounds Patton v. United States, 281 U.S. 276 (1936).³

2. Johnson v. United States, 318 U.S. 198, 201 (1943).

3. See also Viereck v. United States, 318 U.S. 236, 248 (1943) (judge had responsibility, independent of any objection on part of defendant, to assure fair trial by rebuking prosecutor for raising ethnic prejudice in closing argument.)

the court with depriving
him of a fair trial. The
court only followed the
course which he himself
helped to chart and in
which he was released until
the case was argued on
appeal.

These considerations notwithstanding
it is clear that there are some rights that
simply cannot be waived, even with full
understanding and capacity and the advice
of counsel. Perhaps the most obvious are
those protected by the Thirteenth Amendment.
No one would seriously suggest that a
prisoner could enforce a contract whereby
a doctor placed himself into bondage or
a convict became in the event of a
sentence. The same is true of the prohibi-
tion of cruel and unusual punishment. One
cannot waive a criminal defendant's rights
to his innocence and honor of the crime
involved by contractually consenting to
waive them with the surety that he con-
sented. That a court could not subsequently
impose such a penalty on the ground that
the defendant had waived the right to
trial, and that Court has separately held
that there can be no waiver by a defendant
of a criminal defendant's right
not to be tried under any state law.
Greene v. United States, 142 U.S. 622 (1902).
Analogous to other United States
United States, Vol. 1, 27 (1906).

Greene v. United States, 142 U.S. 622 (1902).
See also Victor v. United States, 319
U.S. 111 (1943) (later had retroactive
effect, but was not applied to the
defendant, so as to limit trial by
prosecutor and raise ethical ques-
tions in closing argument).

In Boddie v. Connecticut, 39 U.S.L.W. 4294 (1971), this Court seems, although speaking in a very different context, to have disposed of the basic question in this case. At page 4296 of 39 U.S.L.W., the opinion distinguishes between a hearing, which can be waived, and the opportunity for a hearing, which cannot:

"Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State can, for example, enter a default judgment against a defendant who after adequate notice, fails to make a timely appearance... What the Constitution does require is 'an opportunity... '...for [a] hearing appropriate to the nature of the case,' Mullane v. Central Hanover Trust Co., [339 U.S. 306], at p.313. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing..."

The non-waivability of the opportunity for a hearing arises from the fact that our judicial system presupposes (and its operation is dependent upon) an adversary process, the minimum elements of which are embraced in the concept of due process of law. A court which operates without the adversary process, which operates outside the totality of concepts we call due process

Boyd v. Commonwealth, 39 U.S.L.W. 1211 (1971), this Court seems, although in a very different context, to have disposed of the issue in this case. The case of 39 U.S.L.W. 1211, the Court has distinguished between a hearing, which is required, and a summary judgment, which is not.

The Court in Boyd held that a hearing is required in a case where the government seeks to deprive a person of property without compensation. The Court stated that the Fifth Amendment requires that a person be afforded a hearing before the government can take his property. The Court distinguished between a hearing and a summary judgment, holding that a hearing is required in a case where the government seeks to deprive a person of property without compensation, but that a summary judgment is sufficient in a case where the government seeks to deprive a person of property with compensation.

of law, is a contradiction in terms -- it is not a court. As one decision puts it, a court which operates on confessions of judgment is "a slot machine,"⁴ a collection bureau operating under the guise of a public agency.

The unwaivability of an opportunity to appear is in no whit inconsistent with the many cases holding that a defendant may waive a particular right or procedure even if it is inherent in due process. Whether a defendant in a particular case should exercise a particular right which in the abstract is inherent in civil or criminal due process (e.g., to take the stand in his own defense, or to cross-examine an adverse witness) is obviously a matter best left to his considered judgment. Indeed, it is probably an element of due process that the litigant be allowed to determine for himself whether the exercise of any particular right is necessary or conducive to making his case. That a man may lose a right by deliberately failing to exercise it at the appropriate time is a familiar principle in the law. Cf. Boddie v. Connecticut, supra. This is far from saying that future rights are irrevocably alienated by an act which may have been dictated by economic necessity and which, in any case, occurred long before the litigation between the parties was even contemplated. There is a basic distinction between a waiver made in open court, or after there has been the opportunity to appear, and waivers made in the

4. Columbia Sand and Gravel Co. v. Stresbilt Tile Co., 36 Wash. (D.C.) L.R. 82, 88 (1928).

[illegible]

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marketplace. Our Constitution reiterates King John's promise "To no one will we sell ...right or justice." Griffin v. Illinois, 351 U.S. 12, 16 (1956) (plurality opinion of Black, J.). The acceptance of waivers made in the course of litigation, in contemplation of the judicial process and for the purpose of obtaining some advantage therein, does not breach that promise. But surely a court is selling justice when it accepts a waiver made in the marketplace for the purposes of the marketplace -- a waiver obtained as part of the price of the goods or an opportunity to redeem a default. A simple illustration will suffice: Could any court properly give recognition to a provision in a consumer contract that, in the event of litigation, the buyer may not cross-examine the witnesses presented by the seller? Obviously not, for, unlike the marketplace, access to the essentials of justice is not determined by the respective capital accumulations of the parties. Courts exist to dispense justice without regard to wealth or poverty, not to effectuate the distress sale purchase by the rich of the procedural due process rights of the poor.

The many cases holding that a criminal defendant may, at time of trial and after full opportunity for advice of counsel, forego any of his procedural due process rights do not support the proposition

that a defendant may forego the adversary process itself by confessing judgment.⁵

5. The language of the Court of Appeals for the Ninth Circuit in Simon v. United States, 119 F.2d 539 (1941) seems pertinent:

"Defendant urges, however, that he has not been accorded due process. As we have said above, the jurisdiction of the court to try the case is subject to the controlling provisions of the Constitution. The Fifth Amendment to the Constitution provides that no person shall be deprived of life, liberty, or property, without due process of law. We take it that any waiver of the defendant would be ineffectual if it went so far as to deny him due process of law.

"Due process of law in a criminal proceeding has been defined as consisting of 'a law creating or defining the offense, an impartial tribunal of competent jurisdiction, accusation in due form, notice and opportunity to defend, trial according to established procedure and discharge unless found guilty.'" See §579, p. 1171, and cases cited.

12
The defendant may forego the adversary
process by confessing guilt.

The defendant may also forego the adversary
process by confessing guilt.

The defendant may also forego the adversary
process by confessing guilt.

Again a simple illustration will suffice: Could a state authorize its courts to adjudge criminal cases without ever seeing the defendant, simply on the basis of his confession of judgment presented by a police officer or by a prosecutor? Again the answer is obviously no, despite the potentialities of such a procedure for reducing the congestion of court calendars and the costs of the administration of criminal justice. Such a procedure is so inherently subject to abuse and so inconsistent with the solemn duty of the court to do justice that the mere suggestion of its adoption in the criminal area strikes one as absurd. Why then is it an appropriate device in the adjudication of civil cases? It is surely not because the employees and lawyers of collection agencies and finance companies, etc., are less likely to abuse the court's trust than our police and our public prosecutors. Nor is it because the police would have any greater opportunity to improperly obtain confessions of judgment. Though the police have greater coercive power over a man in their custody, by the same token they have infinitely less opportunity to deceive. The police could not hope to convince a person who had been subjected to extensive interrogation to sign a statement "for our records" as the collection agency convinced amicus Babcock to do. Finally, even were they no more scrupulous than collection agencies, our police must contend with the fact that prisoners will eventually appear before a disinterested judge who will inquire into the circumstances in which they signed any statement the prosecution relies upon. Those who take judgment by confession, on the other hand, need have no similar concern since the

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Received from the State of New York
the sum of \$100.00
for the purchase of land
in the town of ...
County of ...
State of New York
this 10th day of ...
19...

very purpose of such a document is to preclude appearance of the civil defendant before a disinterested judge.

It may be suggested that a confession extinguishes no more rights than does a guilty plea or a default in a civil case. But neither a guilty plea nor a default may occur without an opportunity for a hearing.⁶ As a practical matter, judgment by default is justifiable within due process because it is an absolute necessity to the functioning of the system of civil justice. There exists no mechanism to compel civil defendants to appear and make a plea. If a default did not operate

6. As New York's highest court said in refusing Pennsylvania cognovits full faith and credit:

"When contrasted with default or consent judgments, the harshness and unjudicial-like procedure of the cognovit judgment is exposed as egregious. Prior to rendition of a default judgment, process must have been served so that the debtor is made aware of the pending action, and the plaintiff must have filed a complaint pleading a good cause of action [citation]. The contrast is even greater with respect to consent judgments. A judgment by consent as an agreement between the parties at the commencement of an action upon the terms of the judgment is a product of contemporaneous bilateral action." Atlas Credit Corp. v. Ezrine, 25 N.Y.2d 219, 303 N.Y.S.2d 382, 288, 215 N.E.2d 474 (1969).

to assure judgment for plaintiff, every civil defendant would find it cheaper and more convenient to default than to appear, no matter how air-tight his defense.

We recognize that sometimes a default may occur though a defense exists because the defendant is indigent and unable to present it without counsel. Once again, however, default under these circumstances satisfies due process because no other practicable alternative exists. The Constitution has never been interpreted to require states to provide counsel for the indigent civil defendants. In the absence of such a requirement, and of a default judgment procedure, indigents would be wholly exempt from civil justice.⁷

7. Both default and confession involve the possibility that a judgment can be rendered which would not have been rendered had the defendant been advised by counsel at a certain crucial point. The appropriateness of this in the case of a default merely accentuates the difference between a default and a confession. A default is not a waiver, but rather a foreclosure of rights by standing on them. A man may lose rights and defenses of which he is ignorant by inaction and/or inattention. But a waiver consists in the relinquishment only of known rights. Cf. Johnson v. Zerbst, 304 U.S. 458 (1939). A waiver is a gratuity and a gratuity, being a matter of intention, grants only those things which the grantor had in mind when he executed it. To the extent that the grantor was ignorant of his rights, he could not give them away.

In contradistinction, confession of judgment is in no way essential to the operation of civil justice -- as is demonstrated by the fact that confession does not exist in many states and is severely restricted in many others.⁸ The state in recognizing confessions has unnecessarily adopted a procedure which maximizes all the dangers, problems and faults which have been so carefully minimized in connection with defaults. A default is taken under the supervision of a neutral court, after notice which at least acquaints the defendant with his need for advice and allows him to approach the court clerk for some information as to what is happening to him. A confession is taken under the supervision of the adverse party's employees, they alone being available to answer any questions which might be asked. A default occurs with reference to specific causes of action for specific sums concerning specific transactions. A confession is a general license to take judgment for an unspecified sum on the basis of a future default which the defendant will have no opportunity to explain or justify. Finally, a party filing a complaint is deterred from either intentional or negligent misstatement by the possibility that the defendant

8. Cf. Hopson, "Cognovit Judgment: An Ignored Problem of Due Process and Full Faith and Credit," 29 U.Chi.L.R. 111, 126-136 (1961). Professor Hopson finds that, "...only Illinois, Pennsylvania and Ohio specifically allow for and do not, in some way, restrict cognovits. [These states] stand in splendid isolation..." (131) Of course limited confession still exists in some states as it does in California.

may secure counsel either on a fee or on a pro bono basis. A party filing a confession is constrained by no such consideration.

The waivers involved in a confession of judgment are ineffective for the same reasons that the ex post facto clause and the prohibition of cruel and unusual punishment cannot be waived: Such waivers serve no legitimate purpose of the judicial process. The only possible legitimate judicial interest which confession could serve is reducing congested court calendars through the non-appearance of those who have no defense or who wish to present none. But the law forces no man to appear in court. Those who do not wish to present a defense need not do so, and judgment will go by default. Concededly, there may be some few persons who, but for a confession, would go to the expense of presenting a sham defense in hopes of either deceiving the court or wearing the plaintiff down. But that danger is inherent in a system of due process which requires that every defendant have an opportunity to speak before judgment is taken against him. As a danger it scarcely merits comparison with that of intentional or negligent deception by a plaintiff who knows that the defendant will have no opportunity to speak in his own defense.

II. A CONFESSION OF JUDGMENT PROCEDURE DOES NOT PROVIDE SUCH EVIDENCE OF KNOWING AND VOLUNTARY RELINQUISHMENT AS IS NECESSARY TO A WAIVER OF VITAL DUE PROCESS RIGHTS.

Assuming, arguendo, that the opportunity for a hearing may be waived at all, the question becomes whether confession can constitute an effective vehicle for such waiver. Courts "do not presume acquiescence in the loss of fundamental [constitutional] rights."⁹ Indeed they will "indulge every reasonable presumption against [such] waiver..."¹⁰ In consequence, the burden of proof must always be borne by the party alleging the waiver.¹¹

In the context of the due process clause, waiver consists in "the intentional relinquishment of a known right

⁹Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292, 307 (1967), Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

¹⁰Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937), Johnson v. Zerbst, supra.

¹¹Buder v. Fiske, 174 F.2d 260 (8 Cir.1949), Garvey v. Blatchford Calf Meal Co., 119 F.2d 973 (7 Cir.1941), Madsen v. Travelers Insurance Co., 52 F.2d 75 (8 Cir.1931), and cases there cited.

IN A COURT OF JUDICATURE
THE FOLLOWING CASES WERE
PRESENTED FOR THE
CONSIDERATION OF THE
JURY

1. The first case was
presented by the
prosecution and was
in the nature of a
charge of murder.
The evidence showed
that the defendant
had been seen on the
night of the murder
at the place where
the crime was
committed. The
prosecution also
produced evidence
showing that the
defendant had a
motive for the
crime. The jury
found the defendant
guilty of murder.

2. The second case was
presented by the
prosecution and was
in the nature of a
charge of robbery.
The evidence showed
that the defendant
had been seen on the
night of the robbery
at the place where
the crime was
committed. The
prosecution also
produced evidence
showing that the
defendant had a
motive for the
crime. The jury
found the defendant
guilty of robbery.

3. The third case was
presented by the
prosecution and was
in the nature of a
charge of assault.
The evidence showed
that the defendant
had been seen on the
night of the assault
at the place where
the crime was
committed. The
prosecution also
produced evidence
showing that the
defendant had a
motive for the
crime. The jury
found the defendant
guilty of assault.

4. The fourth case was
presented by the
prosecution and was
in the nature of a
charge of larceny.
The evidence showed
that the defendant
had been seen on the
night of the larceny
at the place where
the crime was
committed. The
prosecution also
produced evidence
showing that the
defendant had a
motive for the
crime. The jury
found the defendant
guilty of larceny.

5. The fifth case was
presented by the
prosecution and was
in the nature of a
charge of burglary.
The evidence showed
that the defendant
had been seen on the
night of the burglary
at the place where
the crime was
committed. The
prosecution also
produced evidence
showing that the
defendant had a
motive for the
crime. The jury
found the defendant
guilty of burglary.

or privilege." Johnson v. Zerbst, 304 U.S. 458, 464 (1938) (emphasis added).¹²

¹²This classic definition, though pronounced in a case concerning the rights of the criminally accused, appears in virtually every succeeding discussion of waiver both in connection with other constitutional rights and with statutory, common law or contract rights. Cf. Curtis Publishing Co. v. Butts, 388 U.S. 130, 143 (1967) (First Amendment rights), Aetna Insurance Co. v. Kennedy, 301 U.S. 389 (1937) (Seventh Amendment right to trial by jury in civil cases), Ohio Bell Telephone Co. v. Public Utilities Commission, 301 U.S. 292 (1937) (Due process rights in rate-fixing hearing), VanBourgh v. Nitze, 388 F.2d 557 (D.C.Cir.1957) (Statutory rights in administrative hearing process), Chambers & Co. v. Equitable Life Assurance Co., 224 F.2d 338 (5 Cir. 1955) (Contract rights), Helvering v. Ethyl D Co., 70 F.2d 761 (D.C.Cir.1934) (Statute of limitation governing liability for back taxes). See generally 28 Am.Jur. 2d 836, *et seq.* and 92 C.J.S. 1041, *et seq.* See also Barber v. Page, 390 U.S. 17 (1968), Application of Gault, 387 U.S. 1 (1967), Fay v. Noia, 372 U.S. 391 (1963), Albert v. Joralemon, 271 F.2d 236 (9 Cir.1959), Equitable Life Assurance Soc. of U.S. v. Mercantile Commerce Bank and Trust Co., 143 F.2d 397 (8 Cir.1944), Everhart v. State Life Ins. Co., 154 F.2d 397 (7 Cir. 1946), State Farm Mut. Auto Ins. Co. v. Retsch, 261 F.2d 331 (10 Cir.1959), Cook v. Commercial Cas. Ins. Co., 160 F.2d 490 (4 Cir.1947).

A. NATURE OF THE ERRORS BELOW

To be effective any waiver must meet two tests: (1) The party must have understood that he was waiving something (i.e., that his act was a waiver); and (2) The party must have understood what he was waiving.¹³ Though the court below held that some confessions may not meet the first test,¹⁴ it took no cognizance whatever of the second test.¹⁵ Moreover, it is our contention that the court below failed to recognize an entirely different issue, the inconsistency of confessions with the individualized scrutiny which is prerequisite to judicial acceptance of a waiver of basic due process rights.¹⁶

¹³Because we are primarily concerned with the validity of non-cognovit confessions, we do not separately deal with a third requirement: That the waiver was free and voluntary. The issue of whether a waiver in an adhesion contract can be truly voluntary is dealt with in appellants' brief and the amicus brief of the National Consumer Law Center.

¹⁴See discussion at subsection D of this Part.

¹⁵See discussion at subsections B and C of this Part.

¹⁶See discussion at subsection E of this Part.

1. The nature of the errors which

to be effective any waiver must meet two tests: (1) The party must have understood what he was waiving and (2) The party must have understood what he was waiving. The court below found that some confusion alone was not enough to set aside the no collateral waiver of the second test. However, it is our conviction that the court below failed to recognize an entirely different issue, the inconsistency of collateral waiver with the individualized nature of the process. It is preposterous to judicially accept a waiver of basic due process rights.

1. The fact that the defendant is a member of the National
2. Communist Party is not sufficient to establish that he is
3. a member of the Communist Party of the United States of America.
4. The fact that the defendant is a member of the National
5. Communist Party is not sufficient to establish that he is
6. a member of the Communist Party of the United States of America.
7. The fact that the defendant is a member of the National
8. Communist Party is not sufficient to establish that he is
9. a member of the Communist Party of the United States of America.
10. The fact that the defendant is a member of the National
11. Communist Party is not sufficient to establish that he is
12. a member of the Communist Party of the United States of America.

See discussion at subsection 1 of
the first page.

See discussion at subsections 2 and
3 of the first page.

See discussion at subsection 1 of
the first page.

Finally, a single uniform error permeates every aspect of the opinion below. That error is the insistence that the plaintiffs factually demonstrate the ineffectiveness of the waiver as to at least a substantial proportion of each of the sub-classes perceived by the court below. On the contrary, however, it is the state's duty to establish a procedure which effectively attempts to assure acceptance of only such waivers as were made knowingly, voluntarily and with untrammelled volition. Had they proven only the bare possibility that some cognovits represented invalid waivers, and that Pennsylvania nevertheless recognized them without any examination whatever, plaintiffs would have made out a prima facie case. It must be remembered that the very purpose, as well as the operation, of confession of judgment is to avoid judicial scrutiny. To justify such a procedure, it was up to the defendants to show not that some, or even most, of the waivers honored without scrutiny were constitutionally effective, but that all of them were. This was not and could not be shown, first, because there is no way short of scrutiny to determine what proportion of confessions of judgment meet constitutional requirements; and second, because the probability is that a large proportion of confessions do not.

B. A CONFESSION CANNOT PROVIDE FOR WAIVER OF AFTER-ARISING RIGHTS AND DEFENSES SINCE THE WAIVING PARTY COULD HAVE NO KNOWLEDGE OF SUCH WHEN HE EXECUTED IT.*

A party can waive only those rights or defenses which he knows himself to have. It is hornbook law that one cannot be held to anticipate and understand rights which are not yet in existence and that, therefore, such rights cannot be waived.¹⁷

Applying those principles to the instant case, it is self-evident that the executor of a confession of judgment cannot have anticipated rights or defenses which arise subsequent to its execution.

¹⁷28 Am.Jur.2d 839-840, 92 C.J.S. 1055-1060; Curtis Publishing Co. v. Butts and Ohio Bell Telephone v. Public Utilities Commission, *supra*. While the lack of knowledge involved in Curtis stemmed from the fact that the rights involved there had not yet been enunciated by this Court, the principles of that case seem equally applicable where the rights are unknown because the facts from which they arose have not yet occurred. Ohio Bell Telephone is even closer since it involved the contention that a company had waived its rights by failing to object at a rate fixing hearing to subsequent confidential consideration by the Commission of evidence not introduced at the hearing. This Court rejected that argument at p.307 of 301 U.S. with the following comment: "As there was no warning of such a course, so also there was no consent to it."

Were every confession of judgment effectuated contemporaneously with its execution this might not be an objection. But a cognovit executed in a contract cannot in good faith be effectuated until something colorably resembling a default occurs--an event which may not take place for months or even years.¹⁸ A similar time lag may exist even where the confession is taken by a collection agency after the default has occurred, as in the cases of amici Babcock and Nunez. The agency might delay filing the confession as part of an agreement to accept installment payments, or simply because it wishes to defer risking court costs until the debtor obtains employment whereupon his wages can be garnished.¹⁹

In the period between the execution of the confession and its filing facts may arise which present potential defenses to the obligation. Without attempting an exhaustive compilation of such defenses we would suggest the following: (1) Complete or partial paying off of the obligation by the defendant; (2) Seller's breach of contract by failure to deliver the goods or services; (3) Timely rescission upon discovery of hidden defects in the goods or services; (4) Seller's breach of warranty by failing to correct defects in the goods or services; (5) Extinguishment of the

¹⁸In some states a confession can be filed immediately after a cognovit is signed, but judgment and execution must await a subsequent pleading alleging default.

¹⁹Although executed on Jan. 20, 1971, amicus Nunez's confession has never been filed.

obligation by a statute of limitations;
 (6) Subsequent conduct by the seller or collection agency which gives rise to a set-off, counter-claim or cross-complaint;²⁰
 (7) Unauthorized practice of law by the collection agency;²¹ (8) Filing of the action in a court which lacks jurisdiction of it.²²

²⁰Under California law, any set-off or claim related to the transaction must be stated in a counter-claim or cross-complaint filed with the defendant's answer. Cal.Code of Civ.Proc. §439. Plaintiff's taking of judgment by confession would presumably extinguish any such counter-claim.

²¹Cal.Bus.and Prof.Code §6947.2. The Sacramento County Superior Court has recently held that unauthorized practice of law constituted a good defense to a suit by a collection agency and has issued a class preliminary injunction on defendant's counter-claim. Northwest Creditors Service v. Chapman, No.196863 (1970).

²²California's Unruh Retail Installment Sales Act's venue provision is jurisdictional. 51 Opinions of the California Attorney General 179 (1969). It is not unknown in California for a collection agency to adopt a deliberate pattern and practice of filing cases in the wrong venue thereby making more difficult the debtor's appearance to defend or claim exemption from wage garnishment. Amicus CRLA recently obtained a very handsome settlement in a class action raising this issue. De La Rosa v. Credit Bureau of Santa Clara County, No.7773, San Benito County Superior Court (execution terminated against class members, named plaintiff obtaining \$2200 actual and punitive damages, \$1400 discovery and other court costs).

Admittedly, a subsequent defense will not arise in every case in which a confession of judgment is filed--probably not even in most such cases. But that is irrelevant. The confession of judgment procedure can constitutionally rest only upon the presumption that in all cases the defendant knew, and intended to waive, all his rights and defenses. The confession of judgment procedure treats alike those cases in which the defendant could not have waived his defenses because they arose only subsequently and those in which no subsequent defenses arose. It provides no mechanism for differentiating these two sets of cases, nor would the procedure suggested by the court below suffice. That procedure entails merely investigating whether the defendant knew what a confession of judgment was when he signed it. But in order to determine whether any defenses arose subsequent to the execution of the confession it would be necessary either to appoint counsel for the defendant or in some other way have a legally competent person scrutinize the course and performance of each contract.

C. THE CONFESSION PROVIDES NO EVIDENCE THAT THE WAIVING PARTY KNEW AND FULLY UNDERSTOOD THE RIGHTS AND DEFENSES AVAILABLE TO HIM AT THE TIME HE EXECUTED IT.

As a confession may involve loss of rights and defenses which arise after its execution, so also may it involve loss of rights or defenses then extant but of which the signatory had no knowledge. The law of consumer transactions and collection is

[illegible]

difficult even for an attorney to understand. It involves knowledge of, and familiarity with, trade practices and the effect upon them of the common law and of statutes themselves highly complex which confusingly and intricately interact with one another. The Federal-Truth-in-Lending Act, and the extensive regulations which have been adopted under it, make some transactions illegal outright and limit others.²³ The Federal Trade Mark and Trade Name Act of 1915 would affect other

²³15 U.S.C. 1601 et seq. and 12 C.F.R. 226.1, the so-called Regulation Z.

Indeed it would appear that amicus Nunez may have a Truth-in-Lending defense to the confession he signed in favor of H.P.-Sears. The terms noted on the fact of the confession (See Exh. B) include an agreement to pay off the supposed obligation in more than four installments. Although collection practices in general are not covered by the Truth-in-Lending Act, Regulation Z provides for a right to rescind and for specific disclosure of the same with regard to any collection arrangement involving more than four installments. Federal Reserve Board Letter No. 328 (May 20, 1970), 4 CCH Consumer Credit Guide §30,383.

The act also provides a right of rescission as to consumer credit transactions in which a security interest is retained or acquired in any real property used as a residence by the consumer. The Federal Reserve Board has interpreted this to apply

(cont'd next page)

transactions. In addition many states have enacted statutes more or less comprehensively governing consumer transactions, and virtually all states have some limitation of usury. For instance, most California retail transactions are governed by the Unruh Retail Installment Sales Act.²⁴ Automobile transactions are further governed by California's Rees-Levering Act.²⁵

Collection agency practices are governed by the Collection Agency Licensing Act,²⁶ the regulations promulgated under it²⁷ and most particularly the

to cognovits and confessions:

"[Since they]...have the effect of depriving the obligor of the right to be notified of a pending action and to enter a defense in a judicial proceeding before judgment may be entered or recorded against him, such clauses and provisions in those states are security interests under §226 (z)."--Board Interpretation, May 26, 1969, 34 Fed.Reg. 8698 (emphasis in original)

²⁴Cal.Civ.C. §1801, et seq.

²⁵Cal.Civ.C. §2981, et seq.

²⁶Cal.Bus. Prof. §6850, et seq.

²⁷16 Cal. Adm.C. §600, et seq.

prohibition against unauthorized practice of law by a collection agency.²⁸ Finally, California law makes voidable all transactions which occur as a result of certain specified misleading or otherwise unfair advertising or trade practices.²⁹

It should be evident that few, if any, laymen will be conversant with the defenses with which such legislation may invest them.³⁰ It is self-evident that a confession of judgment where such defenses exist operates as a license to violate the law and that, if generally allowed, confessions in such circumstances would wholly nullify such salutary legislation. It is

²⁸Cal.Bus. & Prof.C. §6947

²⁹Consumers Legal Remedies Act, Cal.Civ.C. §§1750 et seq.

³⁰Thus, for instance, amicus Nunez did not know that his indigency constitutes a full and complete defense to the county hospital bills to which he confessed judgment in Sear's behalf. Cal.Welf. & Inst. Code §17300, County of Santa Barbara v. Monical, 10 C.A.3d 249, 88 Cal.Rptr. 717 (1970). Nor did he know that, by law, such debts can be litigated only by the county's legal officers and that only upon a specifically alleged and proven request by the county board of supervisors. See discussion at n. 6 of Interest of the Amici. By the same token, amicus Babcock did not know that California law absolves her of the debts of her deserting husband with which Sears tried to charge her. See discussion at n. 3 of Interest of Amici.

no answer to say that the confession of judgment is taken as part of a contract for which there is consideration.³¹ For the very purpose of the consumer legislation here in question was to prevent the execution of contracts containing certain provisions, or under certain circumstances. The addition of a confession of judgment clause to such contracts exacerbates rather than rectifies the evils which the legislation sought to obviate.³²

D. LAYMEN, AND PARTICULARLY
THE POOR, MAY NOT UNDERSTAND
WHAT A CONFESSION IS AND/OR
THAT BY SIGNING IT THEY ARE
WAIVING RIGHTS

Confession of judgment is an abstruse legal concept, the nature and consequences of which are clearly beyond the knowledge of the ordinary layman. Nor is the language of a confession of judgment clause likely to provide much enlightenment to its untutored reader. It can not even be

³¹This statement would, in any case, not be applicable to the post-contract confessions executed by amici Babcock and Nunez.

³²Once again, we recognize that in many confession of judgment cases there will be no defense available, whether extant at the time the confession was executed or arising afterward. As previously suggested, whether or not a defense actually exists in any particular case is irrelevant because the procedure of a confession is to accept all waivers heedless of the existence of any unknown defense. See discussion at p. 28 supra.

read by those who, like amici Babcock and Nunez and many other poor persons, are illiterate, functionally illiterate, literate only in another language, or have grave reading problems.³³

³³Attached as Exhibit A to this brief is the sworn affidavit of Frederick B. Gillette, Director of the Santa Clara County California Welfare Department which was filed April 5, 1971, in support of enforcement proceedings in Wheeler v. Montgomery, C.A. No. 48303 (N.D. Calif. 1969). In that affidavit Mr. Gillette discusses the reading and writing skills of a large proportion of welfare recipients.

The Wheeler case concerned the right of welfare recipients to a hearing prior to termination of their benefits. Its companion case before this Court, Goldberg v. Kelly, 397 U.S. 254 (1970), held that a procedure which allows welfare recipients to submit only written (but not oral) objections to termination could not provide an adequate hearing. In so holding, this Court commented:

"Written submissions are an unrealistic option for most recipients who lack the education attainment necessary to write effectively and who cannot obtain professional assistance."

The implications of that statement for the present case are obvious.

THE SECRETARY OF THE ARMY
WASHINGTON, D. C.
JANUARY 1, 1900

In the absence of counsel, a person who is unclear as to what a confession is would naturally tend to make inquiries of the collection agency's employees--as, for instance, did amicus Nunez. But such employees are themselves laymen who may not understand what a confession is and who, in any case, owe first loyalties to their employers. Any advice they give will predictably tend to be either partisan or misleading, or both. Indeed, all that amicus Babcock was told was that "this is for our records;" while the Court below found that "the only explanation given to signers of judgment notes was that they were signing 'a judgment note.'" 314 F.Supp. at 1097-1098. It is not strange, therefore, that neither of the amici knew what they were doing when they signed the confession of judgment.

These circumstances seem to cry out for the application of the rule that courts "indulge every reasonable presumption against waiver of constitutional rights."³⁴ Presuming that a layman signed a confession out of ignorance is more than just a "reasonable" alternative to presuming that he did so knowingly. This is particularly true in non-cognovit cases, those wherein the confession of judgment is entered into after performance of a unilateral contract has already been rendered. As the lower courts have recognized, one factor to be considered in deciding whether a person knowingly

³⁴Aetna Insurance Co. v. Kennedy, 301 U.S. 389, 393 (1937), Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

and understandingly waived his right is what he might have expected to gain and what he might have expected to lose by such waiver.³⁵ Common sense tells us that the fact that a man gains nothing and risks much by waiving his rights--in other words, that it is directly against his self-interest--is the strongest possible evidence that he did not understand what he was doing when he waived them.

What had amici Babcock and Nunez (not to mention the 130 odd other persons whose confessions of judgment H.P. Sears and Co. has filed in a ten month period) to gain by executing them? Certainly not better terms of consumer credit, since none of these confessions was executed as part of a consumer credit transaction. By the same token, the execution of confessions of judgment by these persons was

³⁵Higgins v United States, 207 F.2d 819 (D.C. Cir.1953) (defendant could not have understood that he could refuse to have his room searched since "no sane man who denied his guilt would actually be willing that policemen search his room for contraband which is certain to be discovered."), Cipres v. United States, 343 F.2d 95 (9 Cir.1965). (Since defendant's assertions of innocence were "certain to be exposed as false the moment the bags were opened" she could not have believed that she could refuse a request to search them.)

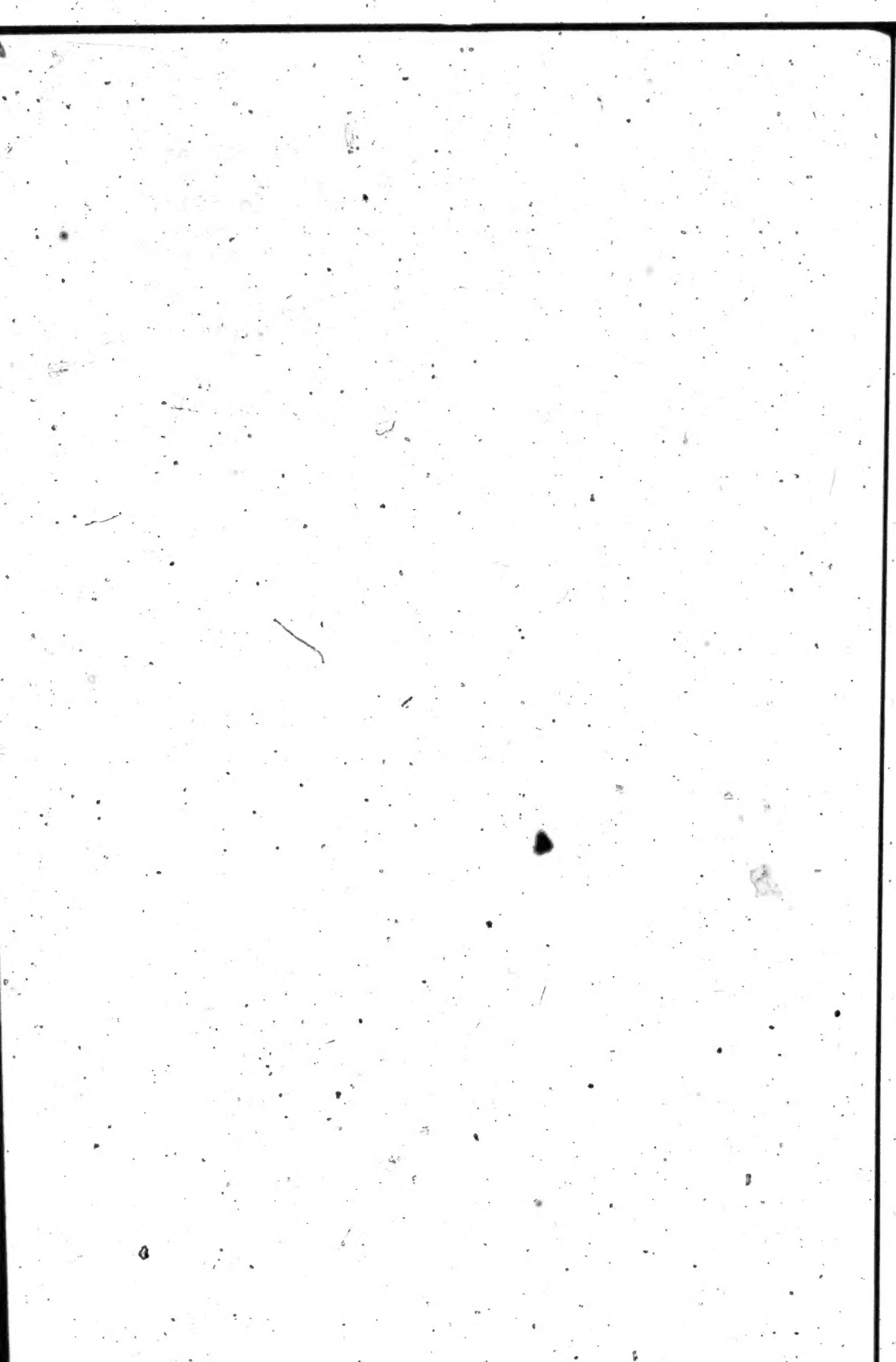
1. The first of these is the fact that the
2. second of these is the fact that the
3. third of these is the fact that the
4. fourth of these is the fact that the
5. fifth of these is the fact that the
6. sixth of these is the fact that the
7. seventh of these is the fact that the
8. eighth of these is the fact that the
9. ninth of these is the fact that the
10. tenth of these is the fact that the

not a prerequisite to the availability of consumer credit to them. Nor was it consideration for Sears' forbearance to file a lawsuit since Sears has made no commitment (whether binding or not) as to this.³⁶ There is but one explanation for amici and those similarly situated signing confessions under these circumstances: They didn't know what they were doing. It follows that their purported waivers of their opportunity to appear was no waiver at all.

E. THE CONFESSION OF JUDGMENT PROCEDURE IS INVALID IN THAT IT DOES NOT PROVIDE FOR THE INDIVIDUALIZED SCRUTINY WHICH IS PREREQUISITE TO THE FINDING OF A WAIVER OF THE OPPORTUNITY TO APPEAR.

The court below determined that most, if not all, of the plaintiffs and those

³⁶Moreover, such forbearance would be of no value to the debtor at all because the confession of judgment makes the filing of a lawsuit unnecessary: the filing of a confession operates as a self-entering judgment, independent, and without necessity, of the filing of a lawsuit. Cf. Federal Deposit Insurance Corp. v. Steinman, 53 F.Supp. 644, holding that confessions are not "suits of a civil nature" as defined in the F.R.Civ.P.: "The right to enter judgment upon a confession contained in an instrument is a common law right which may be exercised without the necessity of suit, i.e., service of process, pleading and judicial determination."



they were found to represent did not understand what a cognovit was. On the basis of that finding it struck down Pennsylvania's confession of judgment laws as applied, but refused to enjoin their application to classes of persons which it deemed to be differently situated. Without delving into the validity of that factual conclusion, it is respectfully suggested that the learned judges misconceived the issue before them. That issue was not whether one or another plaintiff or person represented thereby had or had not understood what he was signing. Rather, at issue is whether Pennsylvania has adopted a constitutionally adequate procedure for determining whether there has been a waiver of the right to due process of law. It is submitted that, had the court below understood its mission in this light, it could only have resolved that question in the negative. For unquestionably the confession of judgment procedure does not provide for the kind of individualized scrutiny of waiver which is mandated by the decisions of this Court. That is true of confession of judgment as it is practiced in Pennsylvania, in California or anywhere else, for the whole purpose of confession of judgment is to avoid any and all judicial scrutiny. That purpose, however, runs squarely afoul of the constitutional principles governing waiver of constitutional rights. This Court held as long ago as Johnson v. Zerbst, supra, that every purported waiver of the opportunity to appear must be individually scrutinized to determine its constitutional sufficiency:

"The determination of whether there has been an intelligent waiver of right to counsel must

depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." (304 U.S. at 464)

Ten years later, this Court articulated in the following language the duties which a judge must perform before accepting a waiver of counsel and/or a guilty plea:

"We have said: 'The constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial court, in which the accused--whose life or liberty is at stake--is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. To discharge this duty properly in light of the strong presumption against waiver of the constitutional right to counsel, a judge must investigate as long and as thoroughly as the circumstances of the case before him demand. The fact that an accused may tell him that he is informed of his right to counsel and desires to waive this right does not automatically end the judge's responsibility. To be valid



THE UNITED STATES OF AMERICA
 DEPARTMENT OF THE INTERIOR
 BUREAU OF LAND MANAGEMENT

WATER RESOURCES DIVISION
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REPORT OF THE
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 NATIONAL COMMISSION
 WASHINGTON, D. C. 20250

such waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, the range of allowable punishments thereunder, possible defenses to the charges and circumstances in mitigation thereof, and all other facts essential to a broad understanding of the whole matter. A judge can make certain that an accused's professed waiver of counsel is understandingly and wisely made only from a penetrating and comprehensive examination of all the circumstances under which such a plea is tendered.³⁷

This requirement of individualized examination is far more necessary to determine volition and understanding in the case of a confession of judgment than in a waiver of counsel, or even a guilty plea.³⁸

³⁷Von Moltke v. Gilles, 332 U.S. 708, 723-724, (1948) (emphasis added; footnotes omitted.)

³⁸Recognizing that Johnson and Von Moltke are criminal cases, it is nevertheless true that the consequences of a waiver of due process rights in a civil case may be every bit as severe or even more so. Moreover, the standards for waiver of constitutional rights set out in Johnson have been uniformly applied to all waivers, whether civil or criminal in nature. See n.12, supra.

1. The first step in the process of the investigation is the identification of the problem. This is done by the investigator who is responsible for the investigation. The investigator must identify the problem and the scope of the investigation. The next step is the collection of data. This is done by the investigator who is responsible for the investigation. The investigator must collect data from the sources that are available. The next step is the analysis of the data. This is done by the investigator who is responsible for the investigation. The investigator must analyze the data and determine the cause of the problem. The next step is the development of a solution. This is done by the investigator who is responsible for the investigation. The investigator must develop a solution that will solve the problem. The next step is the implementation of the solution. This is done by the investigator who is responsible for the investigation. The investigator must implement the solution and monitor the results. The final step is the evaluation of the results. This is done by the investigator who is responsible for the investigation. The investigator must evaluate the results and determine if the problem has been solved.

This image shows a blank, aged, cream-colored page, likely an endpaper or flyleaf from an old book. The paper has a slightly textured appearance with some minor discoloration and faint, dark markings, possibly ink smudges or foxing. A thin, dark line runs diagonally across the left side of the page. There are also some small, dark, irregular shapes scattered across the surface, which could be dust or small tears in the paper. The overall tone is a warm, off-white or light beige.

1. The first step is to identify the problem or question that needs to be answered. This involves understanding the context and the specific requirements of the task.

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WASHINGTON, D.C. 20250

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[illegible]

Such waivers are made orally in open court in the presence of a disinterested judge under circumstances which make immediate physical or mental coercion or overbearing virtually impossible. Without any examination whatever, the judge hearing them would have at least some idea of the defendant's education, whether he speaks English, his innate mental faculties and his sobriety.³⁹ As has been previously suggested, a confession of judgment is so inherently subject to abuse as to make imperatively necessary the kind of detailed examination required by Von Moltke, Johnson, and Sanders, supra. Since the very purpose of confession of judgment is antithetical to this Court's requirement that constitutional waivers be individually scrutinized, confession is necessarily inconsistent with due process of law.

³⁹cf. Sanders & United States,
373 U.S. 1.

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CONCLUSION

For the foregoing reasons, the judgment of the District Court should be reversed.

Dated: June 2, 1971.

Respectfully submitted,

DON B. KATES, JR.
LUCY K. McCABE
MARTIN R. GLICK
California Rural
Legal Assistance
1212 Market St.
San Francisco, Ca.

JAMES H. KOVACS
CECILIA D. LANNON
Legal Aid Society
of Marin County
612 D Street
San Rafael, Ca.

WILLIAM D. SCHUETZ
DAVID L. FREY, JR.
Greater Bakersfield
Legal Assistance
103 Sumner St.
Bakersfield, Ca.

SIDNEY M. WOLINSKY
San Francisco Neigh-
borhood Legal Assist-
ance Foundation
1095 Market St.
San Francisco, Ca.

SIMON N. ROSENTHAL
Legal Aid Society
of San Mateo County
2221 Broadway
Redwood City, Ca.

EARL J. DUNN
DALE H. PARHAM
Tulare County Legal
Services Association
147-1/2 So. K Street
Tulare, Ca.

CAROL RUTH SILVER
ALAN KOENIG
Berkeley Neighbor-
hood Legal Services
2229 Fourth Street
Berkeley, Ca.

JOHN A. CHILDERS
DAVID P. SCHWARTZ
Legal Service Center
of Ventura County
631 East Cooper Rd.
Oxnard, Ca.

By: DON B. KATES, JR.

CONCLUSION

For the foregoing reasons, the
Board of the Federal Reserve should be

EXHIBIT A

AFFIDAVIT

STATE OF CALIFORNIA)

) ss.

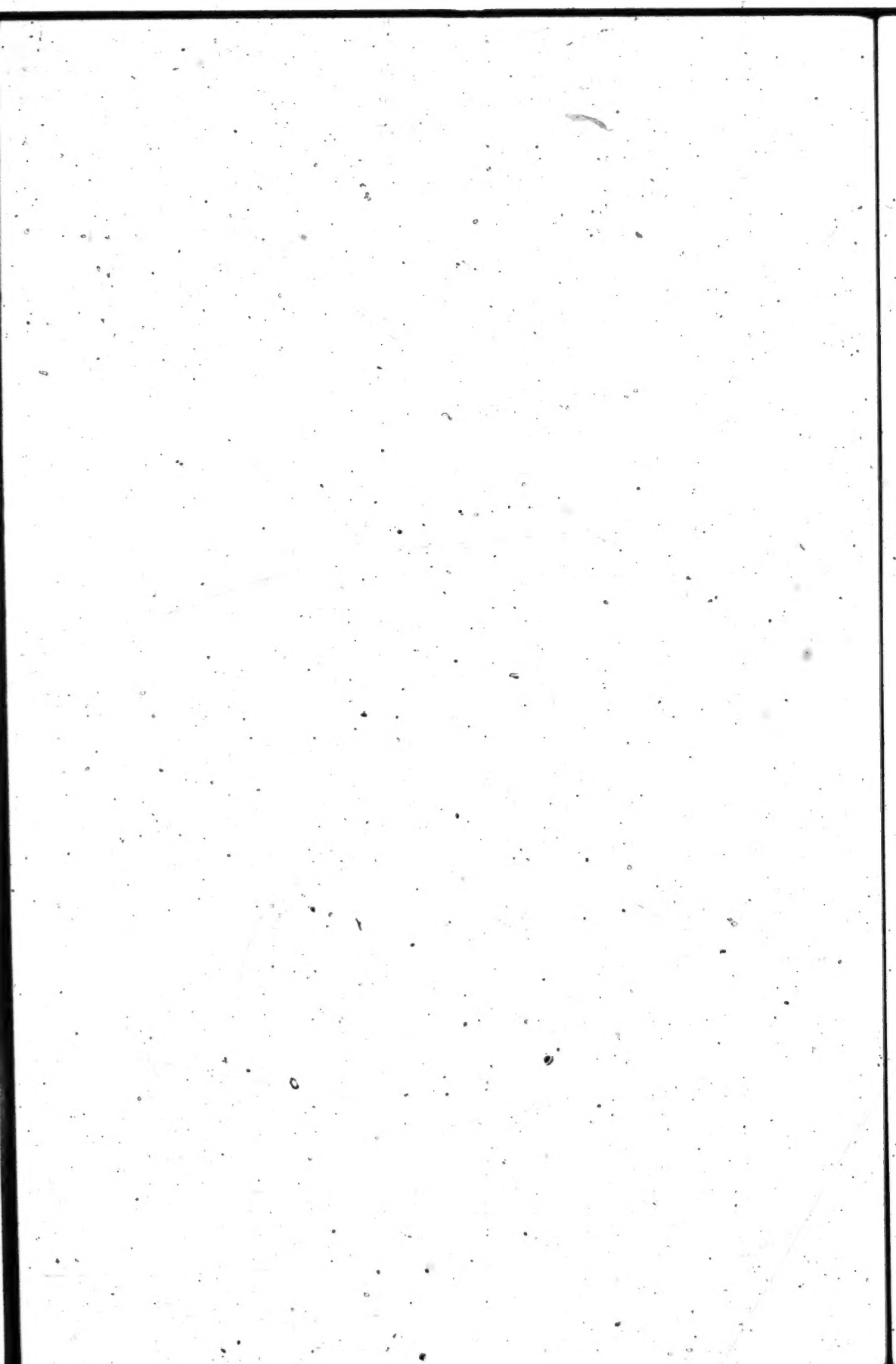
COUNTY OF SANTA CLARA)

I, Frederick B. Gillette, being duly sworn, depose and say: I am presently and for the past six years have been Director of the Santa Clara County Welfare Department. In that capacity I have had occasion to observe and deal with hundreds of welfare recipients and to supervise social workers who deal with thousands.

Many welfare recipients are completely illiterate and many of the rest are "functionally illiterate." By functionally illiterate I mean that while they can painstakingly read and write their names or fill out very simple forms, anything more is completely beyond them. They do not read regularly for business or pleasure and neither reading nor writing are a normal part of their everyday lives. They are incapable either of expressing or understanding in the written word concepts and ideas which might be perfectly clear to them if expressed orally.

Some small number of, but by no means all, welfare recipients are either mentally retarded or are significantly below average intelligence. Even where these recipients do read and write on a level above functional illiteracy, they are incapable of understanding or of easily comprehending and dealing with abstractions and concepts like rights, privileges, duties and responsibilities.

Our "Notice of Action" form (which is used in every instance of a cut-off of welfare grant to inform the recipient thereof) is designed to be as simple as possible; in using and filling out the form, we attempt insofar as possible to describe the action taken simply and concisely. Nevertheless, it has been our experience that welfare recipients often do not understand what the notice of action form is, what specific action was taken with



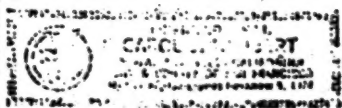
1 regard to them, what the reasons for the actions were, or what
2 rights of appeal they have with regard to the action taken. For
3 this reason the State Welfare Department hearing officials have
4 often accepted appeal requests which said little or nothing more
5 than (in effect): "My aid has been cut off and I want it back."
6 But a recipient who does not know this, and who does not know on
7 what basis action was taken against him or how to express his or
8 her disagreement with that action, would be inclined simply to
9 forego his appeal rights out of frustration and helplessness.
10 Another consideration militating against exercise of the appeal
11 rights is that the very idea of appeal is antithetical to the
12 concepts which many recipients entertain of the welfare system
13 and their relation to it. All too often, recipients are unable
14 to understand that they are entitled to welfare under Federal
15 and State law. Analogizing welfare to private charity, they
16 believe that their benefits exist at sufferance of the officials
17 who distribute them and that they have no right to complain
18 against any action, however arbitrary.

19
20 Dated this 7th day of April, 1971.

21 Frederick B. Gillette
22 FREDERICK B. GILLETTE

23 Subscribed and sworn to before me
24 this 7th day of April, 1971.

25 Carol J. Lambert
26 NOTARY PUBLIC



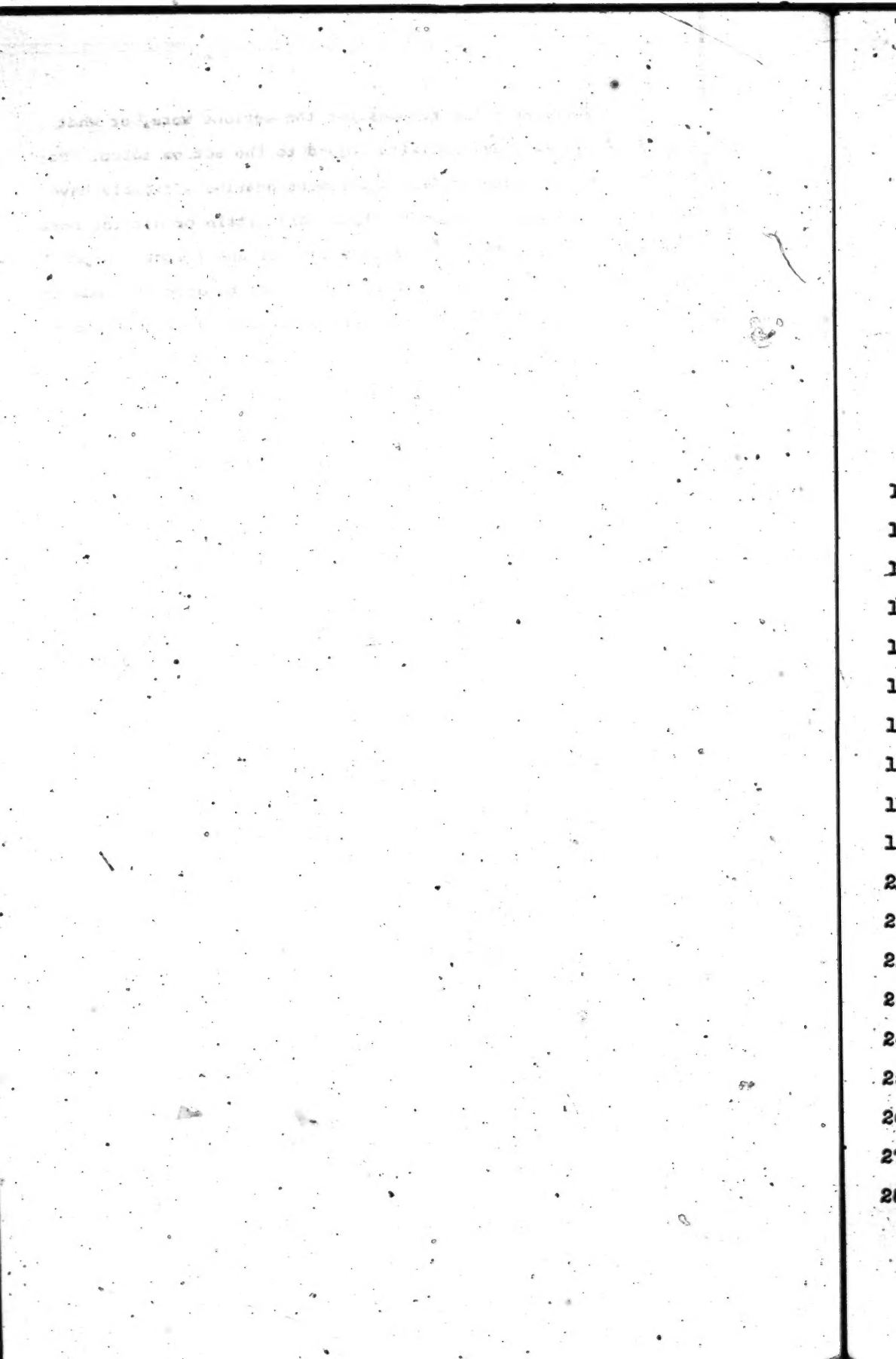


EXHIBIT B

(SPACE BELOW FOR FILING STAMP ONLY)

RICHARD HOOKING
ATTORNEY AT LAW
1403 - 18TH STREET
1007 OFFICE BLDG 2107
BAKER, FIFT O. CALIFORNIA 93308
TELEPHONE 227-8481

*Payments of \$200 per month
beginning July 2, 1971*

*In case payment can not be made
Please call 325-5981 ask for
Ramona L. Lister*

Attorney for _____ Plaintiff

**IN THE MUNICIPAL COURT, BAKERSFIELD JUDICIAL DISTRICT
COUNTY OF KERN, STATE OF CALIFORNIA**

- - 0 - -

HERBERT P. SEARS CO., INC.
a corporation

Plaintiff

vs.

NO.

CONFESSION OF JUDGMENT

MARIO NUNEZ

Defendants

COMES NOW

and confess(es) and agree(s) that judgment may be entered against him/her/them
in the amount of \$ ^{746.57} ~~968.91~~, with interest thereon at the legal rate from
date, which is the amount justly due to and duly assigned to HERBERT P. SEARS
CO., INC., by virtue of the account(s) that follow(s). I/we hereby renew and
reacknowledge the following indebtedness and waive the provisions of the
applicable statute of limitations as of this date according to the California
Code of Civil Procedure Sections 360 and 360.5.

Said accounts are due in the amount and for the nature of
and consideration for the debt set next after the name(s) of the assignor(s)
below:

RECEIVED FOR THE DIRECTOR

RECEIVED FOR THE DIRECTOR
JAN 10 1950
U.S. DEPARTMENT OF THE ARMY
WASHINGTON, D.C.



✓

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1	ASSIGNOR	DUE FOR:	PRINCIPAL:
2	Fern General Hospital	services rendered(? accts)	\$ 67.00
3	Public Vision	services rendered	21.72
4	Donahue & Goodcell	services rendered	278.79

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25 746.51
26 TOTAL \$ 746.51

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28 DATE _____

BOOKING
AT LAW
IN STREET
BOX 2287
FIELD,
A 2287

RECEIVED

THE STATE

OF CALIFORNIA

DEPARTMENT OF THE TREASURY

OFFICE OF THE

COMMISSIONER OF THE GENERAL LAND OFFICE

STOCKTON

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STATE OF CALIFORNIA

COUNTY OF KERN

SS

being sworn, says: that he/she/they is/are the Defendant(s) in the above
entitled action; that affiant(s) has/have read the foregoing confession of
judgment, renewal and reacknowledgment of indebtedness, and waiver of the
statute of limitations and know(s) the contents thereof, that the same is true
of his/her/their own knowledge, except as to the matters which are therein
stated on information or belief, and as to those matters, he/she/they believe
it to be true. We hereby acknowledge receipt of a copy of this document.

Subscribed and sworn to before me this

19

DOROTHY E. MESSENGER, Notary Public
California, Principal Office in Kern County

1. Being duly sworn, I depose that the following is the true and correct copy of the foregoing contents of

2. the original document, to-wit: (the original document) as the same appears in the foregoing contents of

3. the original document, to-wit: (the original document) as the same appears in the foregoing contents of

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9. the original document, to-wit: (the original document) as the same appears in the foregoing contents of

EXHIBIT C

RECEIVED

RICHARD MCCOY
ATTORNEY AT LAW
1420 - 10TH STREET
PO BOX 6000
DANVERS, CALIFORNIA 95920
TELEPHONE 827-0421

'71 MAR 9 AM 8:27

FILED 3-9-71
BY AM DEP. CLERK

Agency for Plaintiff

IN THE MUNICIPAL COURT, DANVERS JUDICIAL DISTRICT
COUNTY OF KERN, STATE OF CALIFORNIA

HERBERT P. SEARS CO., INC.
a corporation

Plaintiff

vs

SOPHIA BABCOCK

Defendants

FEE PAID 9.00

No. 60995

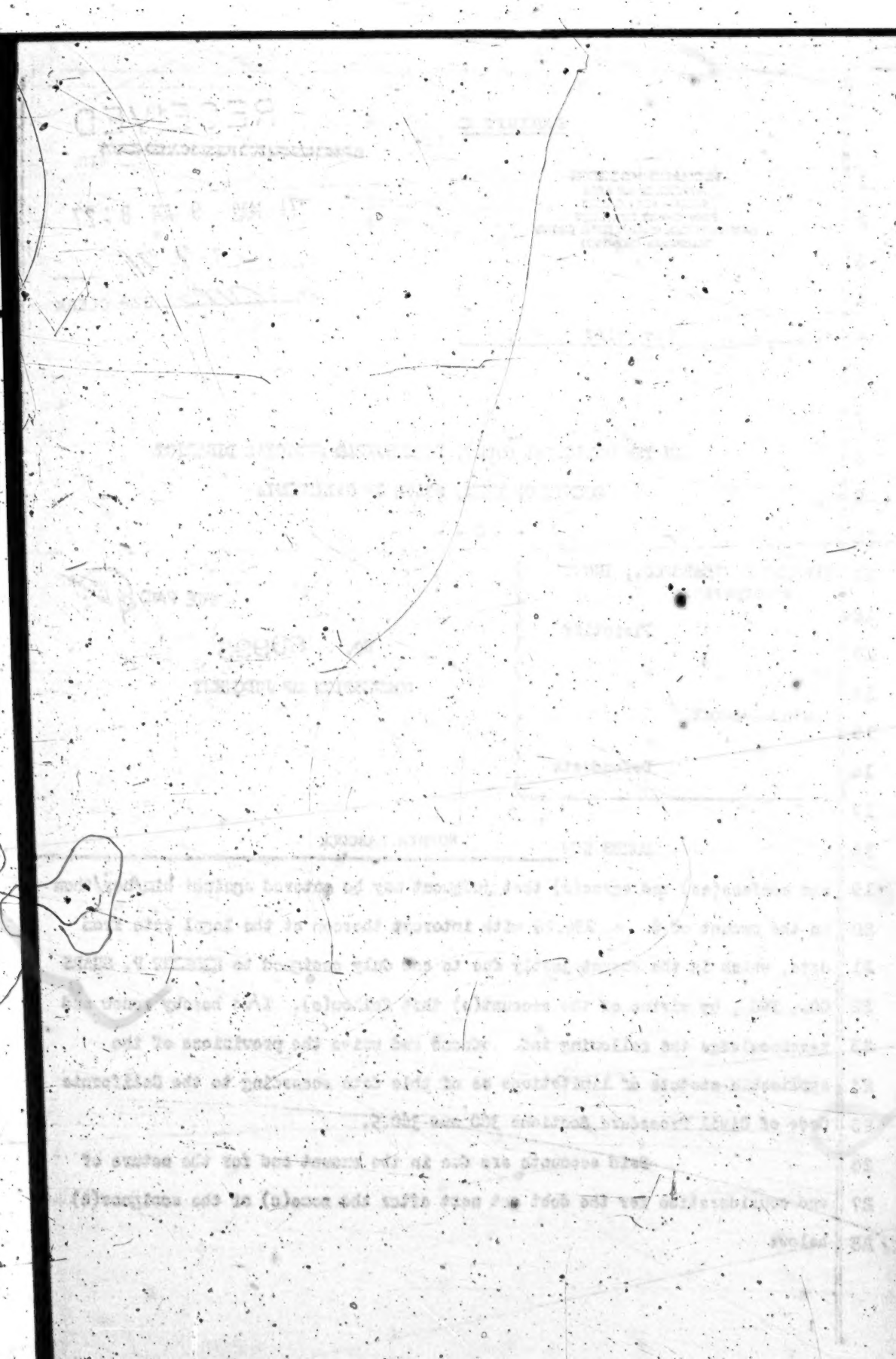
CONFESSION OF JUDGMENT

COMES NOW

SOPHIA BABCOCK

and confess(es) and agree(s) that judgment may be entered against him/her/them in the amount of \$ 234.28 with interest thereon at the legal rate from date, which is the amount justly due to and duly assigned to HERBERT P. SEARS CO., INC., by virtue of the account(s) that follow(s). I/we hereby renou and rescknowledge the following incobtoances and waive the provisions of the applicable statute of limitations as of this date according to the California Code of Civil Procedure Sections 360 and 360.5.

Said accounts are due in the amount and for the nature of and consideration for the debt set next after the name(s) of the assigner(s) below:



1941

1942

1943

1
2 STATE OF CALIFORNIA

3 COUNTY OF KERN

} SS

4 SOPHIA BARCOCK

5 being sworn, says: that he/she/they is/are the Defendant(s) in the above
6 entitled action; that affiant(s) has/have read the foregoing confession of
7 judgment, renewal and reacknowledgment of indebtedness, and waiver of the
8 statute of limitations and know(s) the contents thereof, that the same is true
9 of his/her/their own knowledge, except as to the matters which are therein
10 stated on information or belief, and as to those matters, he/she/they believe
11 it to be true. We hereby acknowledge receipt of a copy of this document.
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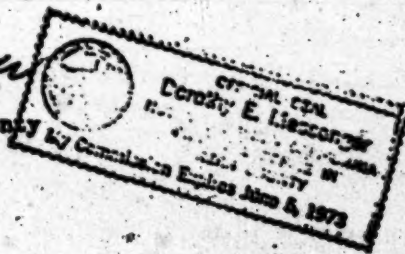
SOPHIA BARCOCK

17 Subscribed and sworn to before me this

18 Jan 11 1977

19 Dorothy E. Messenger

20 DOROTHY E. MESSENGER, Notary Public
21 California, Principal Office in Kern County



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IN THE

Supreme Court of the United States

October Term, 1970.

No. ~~558~~

70-6

NELLIE SWARB, et al.,

Appellants,

v.

WILLIAM M. LENNOX, et al.,

Appellees.

On Appeal From the United States District Court for the
Eastern District of Pennsylvania.

**MOTION OF THE PENNSYLVANIA BANKERS
ASSOCIATION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE ON BEHALF
OF APPELLEES' POSITION.**

JOHN J. BRENNAN,
WILLIAM J. KENNEDY,
1600 Three Penn Center Plaza,
Philadelphia, Pa. 19102

*Counsel for Pennsylvania
Bankers Association.*

Of Counsel:

DECHERT PRICE & RHOADS,
1600 Three Penn Center Plaza,
Philadelphia, Pa. 19102

IN THE
Supreme Court of the United States

OCTOBER TERM, 1970.

No. 538.

NELLIE SWARB, ET AL.,

Appellants,

v.

WILLIAM M. LENNOX, ET AL.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

**MOTION OF THE PENNSYLVANIA BANKERS
ASSOCIATION FOR LEAVE TO FILE BRIEF
AS AMICUS CURIAE ON BEHALF
OF APPELLEES' POSITION.**

The Pennsylvania Bankers Association hereby respectfully moves this Court for leave to file a brief in this case as *amicus curiae* on behalf of appellees' position in support of the Constitutionality of the Pennsylvania confession of judgment practice which is challenged by appellants and in support of appellees' contentions that the court below did not err in otherwise upholding the Pennsylvania confession of judgment practice as applied to certain classes of debtors.

A. Nature of Applicant's Interest.

The Pennsylvania Bankers Association (hereafter "Association") is a Pennsylvania non-profit corporation whose membership is comprised of over 450 national, state and private banks and trust companies in the Commonwealth of Pennsylvania. The purposes of the Association include to protect and promote the Pennsylvania banking system.

The member banks of the Association presently have outstanding thousands of real estate and other bank loans to individuals which are secured in whole or in part by bonds and warrants of attorney accompanying mortgages, by judgments entered of record on the basis of confession of judgment clauses and by other financing documents which contain confession of judgment clauses based upon the applicable Pennsylvania statutes being challenged by appellants in this appeal. If the Pennsylvania confession of judgment practice is declared unconstitutional on its face by the Court as appellants urge, the security interests, judgments and creditors' remedies of the member banks with respect to said loans will be adversely affected by the elimination of the confession of judgment either as a security device or as a remedial procedure. Also, the validity of said bonds and warrants of attorney and other financing documents as a whole may be called into question or their effectiveness impaired as respects other remedies contained therein simply because said documents contain in part allegedly unconstitutional confession of judgment clauses. (See Motion Re Clarification of Temporary Stay Order Dated April 21, 1971 filed with the Court by certain banks and title insurance companies.)

B. None of the Appellees of Record Will Adequately Present the Constitutional and Other Arguments in Favor of Upholding the Pennsylvania Confession of Judgment Practice in Whole or in Part.

The named defendants in the case are the Sheriff of Philadelphia County and the Prothonotary of the Court of

Common Pleas of Philadelphia County. The Philadelphia City Solicitor's office, by Theodore H. Lunine, Esquire, has advised counsel for the Association that the named defendants seek only to receive a clear direction from the Court as to whether or not they should execute on judgments entered by confession. They are neutral as to the merits.

The Commonwealth of Pennsylvania, by the Attorney General, originally took the position in the court below that the applicable statutes were constitutional. On appeal, the Attorney General of Pennsylvania originally took the position that the Commonwealth was a nominal defendant and did not intend to participate. Thereafter, two of the attorneys who had represented appellants in the court below and on appeal to this Court in the filing of the appeal and the jurisdictional statement, Peter W. Brown, Esquire and Joel Weisberg, Esquire, were appointed Deputy Attorney General and Special Assistant Attorney General respectively and took over the active handling of this case on behalf of the Attorney General's office and the Commonwealth. Thereafter, the Commonwealth changed its position and is now actively supporting the *appellants'* position on appeal.

The burden of the defense in the court below was primarily carried by the intervening defendants, Mid-Atlantic Finance Association, an association of finance companies. The finance companies advised the Court that they could no longer underwrite the costs involved in the appeal to the United States Supreme Court and sought permission to withdraw. The Court requested the attorneys for the finance companies to file a motion to dismiss the appeal, which the attorneys did at their own personal expense and so advised the Court. Counsel for the finance companies, Philip C. Patterson, Esquire has advised the Association that any continued participation in this appeal by his firm is at their own personal expense, that they are not sure whether they will file a brief on the merits and if they do, it will be very short and limited.

It is clear that there are no appellees who have the inclination and the resources to adequately present the appellees' position in this appeal.

C. The Attorney General of the Commonwealth of Pennsylvania Has Withheld Consent to the Association Adequately Briefing the Constitutional and Other Issues Raised in This Case.

Peter W. Brown, Esquire, formerly one of the attorneys for the appellants, and now Chief of Civil Litigation for the Attorney General of the Commonwealth of Pennsylvania, has refused to consent to permit the Association to file an *amicus curiae* brief in support of the appellees' position with the exception that Mr. Brown did consent to permit the Association to brief only the limited questions of whether the confession of judgment is constitutional as applied to individuals earning over \$10,000 and whether the confession of judgment is constitutional as applied to bonds and warrants of attorney accompanying mortgages. But the appeal raises a more fundamental and far-reaching issue of the constitutionality of the confession of judgment statutes on their face as well as subsidiary issues relating to the correctness of the ruling of the court below which are argued extensively in the brief of appellants and the brief of *amicus curiae* on behalf of appellants (to which the Attorney General did not object). The limitation which Mr. Brown unilaterally¹ seeks to impose upon the Association would so emasculate its brief as to effectively prevent a complete presentation to the Court of all the arguments in favor of upholding the Pennsylvania confession of judgment practice, either in whole or in part.

As noted above, there are no appellees of record who will actively participate in this appeal. Unless *amicus curiae* is permitted to present the appellees' side of the case to the Court, an important constitutional question may well be decided without effective presentation of one side of the case.

1. The other parties have orally consented to the Association filing an *amicus curiae* brief.

WHEREFORE, Pennsylvania Bankers Association prays
your Honorable Court for leave to file its brief as an *amicus*
curiae.

Respectfully submitted,

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IN THE
Supreme Court of the United States

October Term, 1970

No. 558

NELLIE SWARB et al.,

Appellants

v.

WILLIAM M. LENNOX et al.,

Appellees

**On Appeal from the United States District Court for the
Eastern District of Pennsylvania**

**BRIEF OF THE PENNSYLVANIA CREDIT
UNION LEAGUE AS AMICUS CURIAE**

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INTEREST OF THE AMICUS CURIAE

The Pennsylvania Credit Union League (hereinafter referred to as "the League"), which files this brief with leave of this Court,¹ is a non-profit association of federal credit unions, chartered under the Federal Credit Union Act, 12 U.S.C. 1751 *et seq.*, and the Pennsylvania Credit Union Act, 15 P.S. 12301 *et seq.* The membership of the League consists of 1,329 federal credit unions and 121 state credit unions with a combined individual membership of 983,146 persons, and assets of \$678,977,622.²

The interests of federal and state-chartered credit unions are not represented in this suit, and their statutory organization, purposes and powers differ from those of any other party to this suit.

Section 2(1) of the Federal Credit Union Act (12 U.S.C. 1752(1)) defines a federal credit union as "a cooperative association organized in accordance with the provisions of this Act for the purpose of promoting thrift among its members and creating a source of credit for provident or productive purposes; . . ."

A credit union chartered under the Pennsylvania Credit Union Act is defined in Section 2 (15 P.S. 12302) thereof as "a cooperative association incorporated under this Act or under the Act of May 26, 1933 (P.L. 1076), its amendments and supplements, for the purpose of promoting thrift among its members and creating a source of credit for such members, at reasonable rates of interest, for provident purposes."

At Section 10 thereof (12 U.S.C. 1759), the Federal Credit Union Act defines eligibility for membership in federal credit unions as follows:

¹ The League's motion for leave to file its brief as *amicus curiae* was granted on June 21, 1971.

² All figures as to number of credit unions, individual membership and assets are stated as of December 31, 1970; however, all such figures have increased as of this writing.

"... Federal credit union membership shall be limited to groups having a common bond of occupation or association, or to groups within a well-defined neighborhood, community, or rural district."

Similarly, under the Pennsylvania Credit Union Act, the membership of state-chartered credit unions is limited by the provisions of Section 6A (15 P.S. 12306A) as follows:

"Credit union organizations shall be limited to groups having a potential membership of one hundred or more adult persons and a common bond of association within a well defined community or rural district by reason of occupation or of membership in a religious congregation or fraternal or labor organization. The membership of a credit union shall be limited to and consist of the incorporators of the credit union and such other persons, having the common bond of association, set forth in the Articles of Incorporation as have been duly admitted members, have paid the entrance fee as provided in the by-laws, have subscribed for one or more shares, and have paid the initial installment thereon. Organizations composed principally of the same group as the credit union membership may be members. Employees of credit unions may be members of such credit unions."

Both the Federal Credit Union Act, at Section 8 (12 U.S.C. 1757), and the Pennsylvania Credit Union Act, at Section 5 (15 P.S. 12305), empower credit unions to receive the savings of their *members only* and to make loans to *members only*; provided, however, that such loans are limited "for provident or productive purposes."

The interest of the Pennsylvania Credit Union League, as an *amicus curiae* in this matter, is the representation

of the interests of federal and state credit unions in Pennsylvania, which statutory organizations are unique, and therefore vulnerable, in the context of the far reaching nature and scope of consumer credit transactions. Furthermore, the League recognizes that the decision of the Court in this case will have an immediate effect upon the 307 federal credit unions and the 30 state credit unions in Philadelphia County, which credit unions have a combined individual membership of 247,638 persons and assets of \$174,204,940; and that, ultimately, the decision of this Court will have a similar effect upon the remaining 1,022 federal credit unions and 91 state credit unions having a combined individual membership of 735,508 persons and assets of \$504,772,682, throughout the Commonwealth of Pennsylvania.

Moreover, under the provisions of the Federal Credit Union Act and the Pennsylvania Credit Union Act, the officers and directors of individual credit unions are charged with the strict duty to protect the savings of their members. This is accomplished, *inter alia*, through prudent investment and lending policies and procedures employed by the constituent members of the League.

The League is appearing in this suit on the side of the appellees, for reasons which are set out in detail herein. This posture notwithstanding, the League and its constituent member credit unions have consistently endorsed reasoned judicial determinations and sound legislative and social action for consumer protection. Credit unions are *membership* organizations in the nature of cooperative associations. They exist for the mutual benefit of their members. They provide a depository for savings and a source of credit for the "little man"³ who historically had no other safe place to save his money and no

³ A caricature of the "little man" holding an open umbrella against "hard times, sickness and financial distress" has been the traditional symbol of the credit union movement.

other understanding place to borrow for necessary purposes.⁴ Because of its consumer orientation, the League deplores *any* calculated abuse or continuing misapplication of *any* law to the detriment of *any* person in society. However, the substantive benefits of the statutes and procedures under attack in this suit have been such an integral part of the constructive growth and service of credit unions in Pennsylvania that the League has resolved to come to their defense.

The protective interest of the League in the statutes and procedures which are the subject of this suit is not unqualified, for incidents of misuse of legal process are a matter of common knowledge. Your *amicus curiae* submits, however, that the confession of judgment process is both substantively and procedurally valid and constitutional, as a fundamental matter. It is acknowledged that the process is subject to abuse as a matter of specific pernicious intent; however, it is submitted that there is no principal of constitutional interpretation that the fact that a law *may* be the subject of intentional circumvention or misapplication taints such law as unconstitutional *per se*.

The interest of the League in the preservation of the confession of judgment process is, *primarily*, in its use as a security device and, *secondarily*, in its use as a remedial process.

The Federal Credit Union Act, at Section 15 (12 U.S.C. 1761c), requires that individual loans in excess of an amount determined by a statutory formula be "adequately secured:"

"No loan which is not adequately secured may be made to any member, if, upon the making of that

⁴ E.g., the growth and development of credit unions has traditionally been regarded, not as an "industry" or "business", but as a social and economic "movement." The process is, in fact, properly referred to as "the credit union movement."

loan, the member would be indebted to the Federal credit union upon loans made to him in an aggregate amount which, in the case of a credit union whose unimpaired capital and surplus is less than \$8,000, would exceed \$200, or which, in the case of any other credit union, would exceed \$2,500 or 2½ per centum of its unimpaired capital and surplus, whichever is less."

Credit unions chartered under the Pennsylvania Credit Union Act are authorized to establish, by resolutions of their boards of directors, respective unsecured loan limits beyond which loans must be secured.⁵

The League is concerned that the invalidation of the Pennsylvania confession of judgment procedures will effectively impair the ability of state and federal credit unions in Pennsylvania to serve their members adequately; but, more importantly, will impair the ability of individuals, who are members of credit unions, to obtain credit at reasonable rates from their credit unions, for the reason that such loans could not be secured by the one type of collateral which many such individuals are able to offer: a realty lien⁶ obtained through a consensual judgment, entered by confession. It should be recognized that, in many instances, the only stable collateral that an

⁵ Section 12 of the Pennsylvania Credit Union Act (15 P.S. 12312) provides as follows:

"The directors shall have general management of the affairs of the credit union and are specifically required:

.

(7) To determine the maximum individual shareholdings and, subject to the limitations contained in this act, the maximum individual loan which can be made with or without security; . . ."

⁶ Such a security interest is commonly referred to as a "poor man's mortgage."

individual is in a position to offer as security for a loan is a lien—primary, secondary or tertiary—on his home.⁷

Federal and state credit unions are limited to a finance charge of one per centum per month on unpaid loan balances, and are not authorized to pass *any other costs* on to the member-borrower. Thus a credit union making a \$500 loan to a member who owns real estate, the ownership of which is a material factor in the extension of credit, must, without the benefit of the confession of judgment procedure, consider the use of a mortgage as a lien, at a cost of \$100 attorney's fees, plus recording fees; or, in the alternative, granting a loan without security, realizing that, in the event of default, it would be obliged to employ an attorney at a cost of \$90 to \$190 in attorney's fees, for the preparation and filing of a complaint, and filing and service fees in excess of \$25. These figures are based on the Philadelphia Bar Association Minimum Fee Bill published in March 1971, and must be absorbed by the credit union in its statutory interest rate. On the other hand, a credit union can secure a credit transaction by confession of judgment at a cost of \$6 to \$12. The confession of judgment makes many credit union loan transactions feasible where otherwise they may not be.

The primary interest of the League is, therefore, in a security device which will permit credit unions to serve their members, through the availability of credit at reasonable rates, and to comply fully with their enabling statutes.

⁷ In those jurisdictions where no security lien is available by confessed judgment, the credit union member who has no other property with which his loan may be "adequately secured" must: (1) be denied credit; or (2) make a wage assignment (a procedure which is not available in Pennsylvania); or (3) obtain a co-maker who is willing to pledge his property as collateral, and who renders himself primarily liable on the debt; or (4) pledge his share account balance, and obtain a pledge of the shares of his co-makers, thus impairing the ability of his co-makers to obtain individual credit for themselves.

A security device clearly implies an *ability*, although not necessarily a specific *intent*, to execute on it in the event of default; thus, the execution aspects of the challenged Pennsylvania statutes and procedures are a secondary consideration with the League.

The argument shall proceed in accordance with the League's priority of concern.

QUESTION PRESENTED

It is not the usual practice for an *amicus curiae* to restate the question presented to the Court. However, in this instance the *amicus curiae*'s interpretation of the question has been disputed by the appellants and, in fact, was the basis of appellants' refusal to consent to the League's participation in this appeal.

Initially, appellants had objected to the League's participation beyond a discussion of the exceptions to the injunctive order of the Court below relating to the confession of judgment process, to wit: individual and conjugal incomes; mortgage transactions; and intentional, understanding and voluntary conduct.

As finally stated in appellants' brief:

"The question presented on this appeal is whether the Pennsylvania confession of judgment procedure is in violation of the due process clause of the fourteenth amendment of the United States Constitution *on its face* rather than as applied to only certain individuals or transactions." (Emphasis supplied.)

Thus stated, the question before the Court is the constitutionality of the challenged Pennsylvania statutes and rules of procedure relating to confessions of judgment, as a fundamental matter, rather than the limited issue of the validity or reasonableness of the exceptions of the injunctive order of the Court below. In short, the appellants' statement of the question admits of a discussion of the entire spectrum of constitutional considerations in this suit; and the League's argument will proceed on that basis.

SUMMARY OF ARGUMENT

I. The procedures for entry of judgment by confession and for execution on such judgment are severable. The entry of judgment by confession does not deprive the judgment debtor of "any significant property interest."

II. A. It is a constitutional principle that there is a presumption in favor of the validity of state legislative enactments. The lower Court erred in concluding that the execution of a judgment note constitutes a waiver of constitutionally protected rights; and in concluding that the typical judgment debtor was uninformed as to his liability upon executing an instrument containing a warrant of attorney to confess judgment.

1. The confession of judgment procedure does not deprive the judgment debtor of an opportunity for a hearing. Under Pennsylvania law the judgment debtor has available to him pre-execution procedural remedies to open or to strike a judgment.

2. Under the Truth-in-Lending Act any creditor who retains a security interest, whether actual or potential, in connection with a consumer credit transaction must provide prescribed statutory disclosures to the consumer; and, in prescribed instances, must afford the consumer an opportunity to rescind the transaction.

B. A confession of judgment is contractual; it is a method by which the creditor evaluates the risk to which he puts his goods and capital.

C. A judgment debtor has pre-execution remedies available to him in the form of a petition to open or petition to strike a judgment. There has been no showing that such procedures are uniformly more expensive than would be the defense of an action in assumpsit commenced in the conventional way.

D. The judgment debtor is afforded due process under the fourteenth amendment in that he is afforded a full opportunity for hearing prior to execution on the judgment.

III. Under the Pennsylvania Rules of Civil Procedure, the judgment creditor bears the burden of providing meaningful and provable notice to the judgment debtor prior to execution.

ARGUMENT

I. A Clarification of the Issue.

The matter before the Court is the constitutionality of certain statutes and rules of procedure which are *sequentially* related. In the first instance, the Court has been asked to pass upon a statutory method of obtaining a judgment;⁸ and, secondly, upon the validity of procedures for executing on that judgment.⁹ Despite appellants' contention to the contrary, these procedures are severable and must be considered in that light. Entry of judgment, by confession or otherwise, does not automatically lead to the process of execution and this fact must be recognized; the failure of appellants to acknowledge the separate and distinct character of the judgment and execution processes is a major deficiency in their presentation and a major fallacy in their underlying premises.

In viewing judgment and execution as an inextricably whole process, appellants have attempted to induce a construction that the entry of judgment is a deprivation of property *per se*, and that such entry of judgment is tantamount to an execution. This is misleading. The entry of judgment *per se* does not constitute an order to any public officer to perform any act depriving the judgment debtor of "any significant property interest."¹⁰ In short, if there is a deprivation of property at any point, it is in the execution, not in the entry of judgment. Hence, these processes will be treated separately.

II. Entry of Judgment by Confession.

A. General

It is a constitutional principle of long standing that there is a presumption in favor of the validity of state legislative enactments, and that the Court will not intervene in the implementation or enforcement of the same

⁸ Pa. Stat. Ann., tit. 12, § 738; Pa. Stat. Ann., tit. 12, § 739; Pa. Stat. Ann., tit. 17, § 1482. (See Appendix "A").

⁹ Pa. R.C.P. 2950 to 2976. (See Appendix "A").

¹⁰ *Boddie v. Conn.*, U.S. , 28 L.Ed. 2d 113, 119 (1971).

unless such laws are demonstrably in excess of the power of the legislature: *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937). Furthermore, it is not to be presumed that state courts will be derelict in their duty to give full effect to federal constitutional rights: *Scott v. Henslee*, 104 F. Supp. 218 (D.C. Ark, 1952). The Pennsylvania courts have always been dedicated to the preservation of substantive and procedural "due process of law" in protecting the individual against arbitrary state action: *Commonwealth ex rel. McGlinn v. Smith*, 344 Pa. 41 (1942).

The appellants have attacked the procedure of entry of judgment by confession as a deprivation of property without due process of law. They have not shown that the entry of judgment *per se* substantially affects property rights in any manner which is constitutionally offensive; but, more importantly, there has been no showing that the entry of judgment by confession constitutes a deprivation of property by any standard.

The League, as *amicus curiae*, is under no illusions that there have been no abuses of the confession of judgment procedures by reason of which unscrupulous individuals have profited at the expense of the unwary. However, it is submitted that an evaluation of due process is not merely a matter of isolating selected statutory provisions for random critique.

Fundamentally, an analysis of the propriety of a consumer credit transaction should begin at its inception. Here the Court below erred in two respects: first, in concluding that the execution of a judgment note constitutes a waiver of constitutionally protected rights (i.e., that the signer of the note has no adequately protective recourse against his creditor in the event that the transaction should abort); and, second, in concluding that the typical judgment debtor was uninformed as to his liability upon executing an instrument containing a warrant of attorney to confess judgment.

1. Waiver of a Constitutional Right

Appellants contend that one has a constitutional right not to have a judgment entered against him without a pre-judgment hearing. In support of this contention, appellants have cited cases where well-defined property rights or state benefits were removed, suspended or sequestered prior to hearing on the merits: *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969),¹¹ where the debtor's wages were frozen in a pre-judgment wage garnishment; *Goldberg v. Kelly*, 397 U.S. 254 (1970), where welfare benefits were withheld prior to a hearing on the merits; *Bell v. Burson*, 39 U.S.L.W. 4607 (U.S., May 24, 1971), where an uninsured motorist's license was suspended prior to a hearing on the question of liability. The Court does not have such a situation in the instant case; here the judgment debtor suffers "no deprivation, suspension or sequestration without an opportunity for a hearing."¹² The fact is that a judgment does not, as was the situation uniformly in the cases cited by appellants, effect a dispossession or deprive the debtor of the beneficial use of, or title to, the property or right which is the subject of the action.¹³ As noted in appellants' brief, this Court

¹¹ In contrast to *Sniadach's* facts, Pennsylvania law prohibits wage garnishment: Pa. Stat. Ann., tit. 42, § 886.

¹² In *Owenbey v. Morgan*, 256 U.S. 94 (1921); *Coffin Bros. v. Bennett* 277 U.S. 29 (1928); and *McKay v. McInnes*, 279 U.S. 820 (1929), the Court upheld prejudgment garnishment of property other than wages.

¹³ *Santiago v. McElroy*, 319 F.Supp. 284 (D.C., E.D. Pa. 1970), heavily relied upon by appellants, involved the deprivation of property, by actual taking and sale under distraint proceedings before judgment and hearing. That case is clearly distinguished from the instant case, for here, in *Swarb*, there is available to the debtor, as a matter of right, an opportunity to be heard on the merits before any property is taken from him. The same considerations which governed *Santiago* controlled earlier in *Sniadach v. Family Finance Corporation*, 395 U.S. 337 (1969), where the Court said, at page 340, that "the interim freezing of wages without a chance to be heard violates procedural due process." *Osmond v. Spence*, 39 U.S.L.W. 2660 (D.Del., May 13, 1971), is of little persuasive assistance because the Court in that case merely followed *Swarb*; however, the Delaware statute which was invalidated in *Osmond* permitted, *inter alia*, garnishment of wages without notice, thus effectively bringing the case into the posture of *Sniadach*.

recently addressed itself to the question of procedural due process in the matter of *Boddie v. Connecticut*, U.S. 29 L.Ed. 2d 113 (1971). In that case the Court said, at page 119:

"Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. The State can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance [citing *Windsor v. McVeigh*, 93 U.S. 274 (1876)], or who, without justifiable excuse violates a procedural rule requiring the production of evidence necessary for orderly adjudication"

At a later point in its opinion in the *Boddie* case, the Court said, at page 119:

"The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings. That the hearing required by due process is subject to waiver, and is not fixed in form does not affect its root requirement that an individual be given an opportunity for a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event."

It is clear that the right to a hearing on the merits is constitutionally protected. This Court, however, recognizes that the time and circumstances of such hearing need not occur in accordance with a specific time table nor within a specific format. In short, when appellants speak of the waiver of a constitutionally protected right, they put the "rabbit in the hat" by assuming the exclusive validity of a procedural format in accordance with their

own preference. They *assume* that there can be no due process of law without a pre-judgment hearing; and they simultaneously deny that a post-judgment, pre-execution hearing can afford due process. There are no cases to support these assumptions.

In Pennsylvania, judgment debtors have available to them the right to a hearing on the merits. It is true that it is necessarily, and by definition, the case that petitions to open and petitions to strike judgments are post-judgment procedural remedies. To that extent a pre-judgment hearing is waived; the right to a post-judgment hearing on the merits is not. That the post-judgment remedies are available is not disputed by the appellants. The issue, then, is neither deprivation of property without due process, nor a deprivation of process itself; the issue is when such process must be made available and whether the individual can knowingly postpone it.

In its order, the Court below stated as follows:

"... no judgment may be entered against members of the class described ... upon relevant documents ... unless it has been shown that the signers of such clauses have intentionally, understandingly, and voluntarily waived all rights lost under Pennsylvania law ... when executing a document containing such a clause"

The Court below seriously erred in evaluating the extent to which a debtor has available to him the necessary information to make an "intentional, understanding and voluntary" decision whether or not to execute a lien document.

2. Intentional, Understanding and Voluntary Conduct

The Court below entirely misconstrued the import of the Consumer Credit Protection Act (15 U.S.C. 1601 *et seq.*), Title I of which is commonly referred to as the

"Truth-in-Lending Act" and Federal Reserve Board Regulation "Z" (12 C.F.R. 226 ff.) which implements the Act. The Court below concluded that the Truth-in-Lending Act and Regulation "Z" provided borrowers in mortgage transactions the opportunity to rescind such transactions; and that the Act and the Regulation offered no comparable protection to other consumers. The Court's conclusions in both instances were erroneous.

The Truth-in-Lending Act provides, at 15 U.S.C. 1635(a), as follows:

"Except as otherwise provided in this Section, in the case of any consumer credit transaction in which a security interest is retained or acquired in any real property which is used or is expected to be used as the residence of the person to whom credit is extended, the obligor shall have the right to rescind the transaction until midnight of the third business day following the consummation of the transaction or the delivery of the disclosures required under this Section and all other material disclosures required under this part, whichever is later, by notifying the creditor, in accordance with regulations of the Board of its intention to do so. The creditor shall clearly and conspicuously disclose, in accordance with regulations of the Board, to any obligor in a transaction subject to this Section, the rights of the obligor under this Section. The creditor shall also provide, in accordance with regulations of the Board, an adequate opportunity to exercise his right to rescind any transaction subject to this Section."

An exception exists in the case of a first mortgage negotiated for the purpose of financing the purchase of a dwelling.

Section 226.2(z) of Regulation "Z" provides:

"'Security interest' and 'security' mean any interest in

property which secures payment or performance of an obligation. The terms include, but are not limited to, security interests under the Uniform Commercial Code, real property mortgages, deeds of trust and *other consensual or confessed liens* whether or not recorded, mechanic's, materialmen's, artisan's, and other similar liens, vendor's liens in both real and personal property, the interest of a seller in a contract for the sale of real property, any lien on property arising by operation of law, and any interest in a lease when used to secure payment of performance of an obligation." (Emphasis supplied.)

Additionally, where a lien or security interest in real property is given, *including* a first mortgage negotiated for the purpose of financing the purchase of a dwelling, Section 226.8(b)(5) requires the following disclosures:

"A description or identification of the type of *any security interest held or to be retained or acquired* by the creditor in connection with the extension of credit, and a clear identification of the property to which the security interest relates or, if such property is not identifiable, *an explanation of the manner in which the creditor retains or may acquire a security interest* in such property which the creditor is unable to identify. In any such case where a clear identification of such property cannot properly be made on the disclosure statement due to the length of such identification, the note, other instrument evidencing the obligation, or separate disclosure statement shall contain reference to a separate pledge agreement, or a financing statement, mortgage, deed of trust, or similar document evidencing the security interest, a copy of which shall be furnished to the customer by the creditor as promptly as practicable. If after acquired property will be subject to the security interest, or if

other or future indebtedness is or may be secured by any such property, this fact shall be clearly set forth in conjunction with the description or identification of the type of security interest held, retained or acquired." (Emphasis supplied.)

It is singularly noteworthy that the security interest referred to need not have been perfected. The fact that it is contingent, or a mere expectancy, or a mere possibility is sufficient to bring it within the protective provisions of the Act and Regulation.

Thus, under the Truth-in-Lending Act and Regulation "Z", the creditor *must* disclose to the consumer (debtor), *prior* to the consummation of the credit transaction, any lien or security interest which the creditor will or may by perfection obtain thereby. In every respect, the legal presumptions and burdens inure to the benefit of the debtor; they are onerous to the creditor, for the slightest error on the part of the creditor will involve penalties of noticeable magnitude. At any event, the law very carefully prescribes the nature, form and content of required credit disclosures. Can the consumer who fails to take notice thereof be heard to complain that he has been misled or denied pertinent information? It is submitted that the consumer who has been given the required disclosures and credit information ignores such at his peril.

So far as concerns the debtor's right under the Truth-in-Lending Act to rescind certain transactions Section 226.9(a) of Regulation "Z" provides as follows:

"Except as otherwise provided in this section, in the case of any credit transaction, in which a security interest is or will be retained or acquired in any real property which is used or is expected to be used as the principal residence of the customer, the customer shall have the right to rescind that transaction until midnight of the third business day following the date

of consummation of that transaction or the date of delivery of the disclosures required under this Section and all other material disclosures required under this Part, whichever is later, by notifying the creditor by mail, telegram or other writing of his intention to do so. Notification by mail shall be considered given at the time mailed; notification by telegram shall be considered given at the time filed for transmission; and notification by other writing shall be considered given at the time delivered to the creditor's designated place of business."

Section 226.9(b) of Regulation "Z" prescribes the precise form of notice which the creditor is required to give to the consumer advising him of his right to rescind that transaction which may result in a lien. The Regulation prescribes not only the precise language of the notice, but also the type size and number of copies which must be delivered. Failure of the creditor to provide such disclosures and notices subjects him to civil and criminal penalties. The effect of this provision is to give the consumer an opportunity to review the wisdom of his conduct prior to making an economic commitment, and the right to withdraw if the wisdom thereof is found wanting.

The Congressional findings and declaration of purpose in the enactment of the Consumer Credit Protection Act are set forth in 15 U.S.C. 1601:

"The Congress finds that economic stabilization would be enhanced and the competition among the various financial institutions and other firms engaged in the extension of consumer credit would be strengthened by the informed use of credit. The informed use of credit results from an awareness of the cost thereof by consumers. It is the purpose of this subchapter to assure a meaningful disclosure of credit terms so that

the consumer will be able to compare more readily the various credit terms available to him and *avoid the uninformed use of credit.*" (Emphasis supplied.)

It is true that, when appellants (plaintiffs below) commenced this suit, the Truth-in-Lending Act had been in effect for only five months; accordingly, it is possible that these plaintiffs did not receive the information now required, in the manner now required, under the Truth-in-Lending Act.

However, the import of the Truth-in-Lending Act is its effect upon the consumer's "intent, understanding and volition." Since the Truth-in-Lending Act was designed to promote information and selectivity among consumers, it cannot now be said that consumers are denied the necessary information to make an informed choice whether or not to deal with a particular creditor or on such creditor's terms.

It must be recognized that the Congress, in prescribing the afore-quoted disclosure requirements and rescission provisions, impliedly acknowledged the constitutional validity of consensual and confessed liens as viable and enforceable security devices.

To this point, also, the appellants have protested against contracts of adhesion. This protest must also fail, for the very purpose of the Truth-in-Lending Act was to enable consumers to secure sufficient information, before entering into credit transactions, to determine the providence or improvidence thereof, and to avoid the latter by trading elsewhere.

With the disclosures required under the Truth-in-Lending Act and Regulation "Z", the Court below should have found that the individual consumer is provided sufficient information to act on a knowledgeable and informed basis. *Otherwise the Truth-in-Lending Act has failed of its purpose and the appellants have not asserted this.*

B. Contract

Clearly, under the Truth-in-Lending Act, contracts of adhesion can be avoided. The consumer has this choice; whether he exercises that choice prudently is properly a matter of concern to the State courts and legislature. At the same time a particular creditor may or may not insist that a warrant of attorney be executed. It is, after all, in a very real sense one method by which the creditor evaluates the risk which he is being asked to take with his goods or his capital. If the creditor has disclosed to his customer the security interest required, as provided by the Truth-in-Lending Act, can his insistence on this measure of protection be seriously criticized on a constitutional basis? It is submitted that it cannot.

The Court below acknowledged that a consumer could enter into a contract or consumer transaction and in doing so provide his creditor with predetermined remedies. That this is so is clearly evident in the multiple exceptions which the Court below provided to its injunctive order. However, as noted, the Court below had ample basis to deny the injunction altogether. In short, the Court below was clearly not aware of the information available to even the most humble users of credit, regardless of income; and that Court's decision would most certainly have been different had it had this awareness.

In the context of the operation of the credit union movement, the warrant of attorney to confess judgment is a valid and viable contractual provision which permits the securing of credit transactions which might otherwise require rejection or denial. In such transactions, judgment notes are most assuredly executed "intentionally, understandingly and voluntarily," for the parties to such transactions are governed not only by the protective provisions of the Truth-in-Lending Act, but also by the spirit of mutuality and integrity that underscores the philosophy of the credit union movement.

C. Remedies

Just as an informed consumer can exercise selectivity in his credit transactions, so he can by contract rearrange the timing of his remedies. Should the consumer believe a judgment to have been improperly or improvidently entered, he has procedural remedies available to him in the form of a petition to open the judgment or a petition to strike the judgment.

The appellants have complained of the expense of a proceeding to open a judgment. They have, however, chosen to overlook the fact that there is expense also in defending a suit in assumpsit commenced by complaint. It is possible that the expense of the former may exceed the latter in some instances. However this factor cannot be postulated as a general rule, although this is appellant's clear implication. Just as there are filing fees, deposition costs and attorneys' fees involved in proceedings to open judgments, there are similar fees and costs involved in defending a lawsuit commenced by complaint in the conventional way. There has been no showing that the financial burden and inconvenience involved in the opening of a judgment is any greater in the final analysis than would be the expense and inconvenience of defending an action in assumpsit.

The appellants also complain of the shifting of the burden of proof inherent in proceedings on a petition to open a judgment. The requirements are neither so grave nor so burdensome as the appellants suggest. An application to open a judgment is an equitable proceeding and is governed by equitable principles: *Deviney v. Lynch*, 372 Pa. 570 (1953). When, for example, a preponderance of the evidence, or the weight of the evidence, is in favor of the judgment debtor's allegations, which present a sufficient defense, the judgment will be opened: *Bright v. Diamond*, 189 Pa. 476 (1899). In effect, all that is required of a judgment debtor in a procedure to open a judgment

is a legally sufficient reason. These are principles of long standing in Pennsylvania. Following the opening of the judgment, the debtor is entitled to a trial by jury on the merits. Whether or not the judgment debtor may be required to pay accrued sheriff's costs is in the equitable discretion of the court; it is not procedurally automatic as appellants imply.

In *Boddie v. Connecticut*, U.S. , 28 L.Ed. 113 (1971), this Court said, at page 117:

"The legitimacy of the State's monopoly over techniques of final dispute settlement, even where some are denied access to its use, stands unimpaired where recognized, effective alternatives for the adjustment of differences remain."

The foregoing quotation governs this case. The substantive law and procedural remedies afforded in Pennsylvania are such that "recognized, effective alternatives" to the conventional action in assumpsit are available.

Nor is this principle one of recent origin. This Court said, in *Windsor v. McVeigh*, 93 U.S. 274, 278 (1876):

"The period within which the appearance must be made and the right to be heard exercised, is, of course, a matter of regulation, depending either upon positive law, or the rules or orders of the court, or the established practice in such cases."

It is clear that this Court has acknowledged, for nearly a century, that due process is served if a hearing on the merits is afforded. And the time therefor is to be determined by the State.

D. Due Process

In the final analysis, it is not the law which is objectionable, but its application in some instances. It cannot be denied that the confession of judgment process

has on occasion been abused by over-anxious and unscrupulous creditors. There has been no showing that this type of creditor is representative of the majority. It is submitted that there is no constitutional principle that a law or process which is susceptible to misuse in some instances is *per se* offensive to the Constitution.

It is submitted that procedural due process is not denied by the entry of judgment by confession and that there is no deprivation of any property right resulting from such judgment. This Court has held that "due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment": *American Surety Co. v. Baldwin*, 287 U.S. 156, 168 (1932). In *Bower v. Casanave*, 44 F. Supp. 501 (D.C., S.D.N.Y., 1941) the Court said, in passing upon an attack on a judgment entered by confession:

"Obviously it is not unconstitutional. It needs no further citation of authority to show that judgments by confession have been recognized and ruled upon by the United States Supreme Court."

In striking down a pre-judgment replevin statute the Court in *Laprease v. Raymours Furniture Company*, 315 F. Supp. 716, 725 (D.C., N.D.N.Y. 1970) said:

"In so declaring, we do not hold or intend to intimate that nothing less than a full adversary evidentiary hearing prior to seizure, will comport with the requirements of procedural due process."

The Court implicitly acknowledged that due process is satisfied if, as in Pennsylvania, a hearing on the merits is available at some point prior to execution.

Abuses of statutory procedures, it is submitted, are properly the subject of state corrective action. In *Otis*

Co. v. Ludlow, 201 U.S. 140, 154 (1906), Mr. Justice Holmes said for the Court:

"We cannot wholly neglect the long settled law and common understanding of a particular state in considering the plaintiff's rights. We are bound to be very cautious in coming to the conclusion that the Fourteenth Amendment has upset what thus has been established and accepted for a long time."

In support of their contention that the confession of judgment procedures violate due process, appellants cite a substantial number of criminal law cases. It is submitted that these citations are inapposite; the instant case involves civil liabilities, civil procedures and civil remedies.¹⁴ Additionally, appellants have relied heavily on "equal protection" cases (without treating the issue of "equal protection") which have no persuasiveness in this particular due process context. This case involves actions on debts—not marriage and divorce (*Boddie v. Connecticut*, U.S. , 28 L.Ed. 2d 113 (1971)); not adoptions (*Armstrong v. Manzo*, 380 U.S. 545 (1965)); and not any type of case wherein the subject matter is marked by substantive and procedural uniqueness.

Due process of law does not require that this Court supervise the relations of the parties to every social or commercial transaction;

"Without a prior judicial imprimatur, individuals may freely enter into and rescind commercial contracts. . . ."; *Boddie v. Connecticut*, U.S. , 28 L.Ed. 2d 113, 118 (1971).

Additionally, the Court should not be confined to an analysis of isolated statutes without the opportunity to

¹⁴ In *Griffin v. Illinois*, 351 U.S. 12 (1956), the Court emphasized that criminal due process does not control in civil cases.

view them in context. The disclosures required under the Truth-in-Lending Act provide ample basis for a determination that the granting of a contractual authorization to confess judgment is not an uninformed act. Where the entry of judgment in the first instance is *prima facie* consensual and informed, it should not be presumed to be unconscionable or in contravention of constitutional due process.

III. Execution Process.

As noted, appellants imply that the execution process is inherently and automatically an extension of the confession of judgment process. It is not. In credit union practice, it is common and customary, that judgment should be entered on a note with no specific intent that execution should ever follow.

Appellants complain that notice of execution is inadequate. It is submitted that the contention is without merit. Pennsylvania Rule of Civil Procedure 2958 provides, in its pertinent parts, as follows:

“(a) Within twenty (20) days after the entry of judgment the plaintiff shall mail to the defendant, by ordinary mail addressed to the defendant at his last known address, written notice of the entry setting forth the date, the court, term and number and the amount of the judgment, and file with the Prothonotary an affidavit of mailing of the notice. Failure to mail the notice and file the affidavit shall not affect the lien of the judgment.

(b) Within twenty (20) days after the entry of judgment the plaintiff may issue a writ of execution even if the notice has not yet been mailed and the affidavit of mailing has not yet been filed. The lien of any levy or attachment made pursuant to such a writ within or after the twenty (20) day period shall be valid. How-

ever, no further proceedings may be had pursuant to such writ until twenty (20) days after the notice has been mailed and the affidavit of mailing has been filed.

(c) If no affidavit has been filed within the twenty (20) day period after the entry of judgment, no writ of execution may be issued thereafter until twenty (20) days after the affidavit of mailing has been filed.¹⁵

.

The time period allotted is identical to the time allotted by Rule 1026 of the Pennsylvania Rules of Civil Procedure for the filing of an answer to a complaint in assumpsit.

In addition to the aforesaid notice of execution, the burden of which is upon the judgment creditor, the Court's attention is also called to the provisions of Philadelphia Rule of Civil Procedure 3129*(f) which provides as follows:

"(1) Notice to be given prior to execution upon judgment entered on bond accompanying a mortgage. No execution shall issue upon a judgment entered on a bond accompanying a mortgage to condemn or sell the mortgaged premises unless the plaintiff, or some person on his behalf, shall file of record an affidavit setting forth, to the best of his knowledge, information, and belief, the name and address of the real owner or owners of the premises, and that written notice of the date of entry of said judgment, with the court, term, and number thereof, has been sent by registered or certified mail to such owner or owners and to the obligor on the bond. If the affidavit shall aver that the plaintiff, or the person making the affidavit on his behalf, does not know and has not

¹⁵ Cf., *Osmond v. Spence*, 39 U.S.L.W. 2660 (D.Del., May 13, 1971), where 10 day notice of sale (as compared with Pennsylvania 20 day notice of entry of payment) was held to be insufficient.

been able to ascertain the owner or owners of the mortgaged premises or their addresses, or the names or addresses of some of them, or the whereabouts of the obligor, such an affidavit shall be a compliance with this rule as to the owner or owners and obligor whose names or addresses are unknown.

(2) Notice to be given upon any execution for the sale of real estate.

At or after the time of the issuance of any writ of execution for the sale of any real estate, the plaintiff, or some person on his behalf, shall give written notice by personal service on, or by registered or certified mail to, the defendant in the writ and to the real owner or owners of the real estate to be sold, stating the place, date, and hour of the intended sale and the real estate to be sold, which date shall be at least ten days after the giving of such notice as aforesaid, and shall, before the date of the sale, file an affidavit in the office of the Prothonotary that said notice has been given in accordance with this rule, or that the plaintiff or the person making the affidavit on his behalf does not know and has not been able to ascertain the real owner or owners of said real estate or their addresses, or the names or addresses of some of them, or the whereabouts of the defendant in the writ, in which case such an affidavit shall be a compliance with this rule as to the real owner or owners whose names or addresses are unknown, or as to the defendant in the writ whose whereabouts are unknown."¹⁶

Again, the burden of providing meaningful, provable notice and of filing proof of same with the Prothonotary, is upon the judgment creditor. Falsification of an affidavit of notice is, of course, a matter of perjury.

¹⁶ These procedures are in addition to, and not in lieu of, the requirements of Rule 2958, *supra*.

As a practical matter, in credit union practice executions on confessed judgments are rare. Nonetheless, it is submitted that the notice requirements set forth in the afore-quoted rules of civil procedure provide the judgment debtor ample opportunity to pursue such remedies as may be appropriate under the circumstances of the individual case. It is to be noted, however, that the process of execution is independent from the procedure for the entry of judgment by confession. Appellants have implied that the former is merely an extension of the latter; this is clearly not the case since additional procedural measures are required for the purpose of initiating an execution.¹⁷

CONCLUSION

The question for consideration by the Court is one of due process. There has been no substantial discussion of the question of the denial of "the equal protection of the laws" under the fourteenth amendment. It is submitted, without further discussion, that the order of the Court below *does* deny equal protection in that: (1) its substance as regards individual and conjugal income is arbitrary, and (2) its substance as regards mortgage transactions and intentional, understanding and voluntary conduct is in disregard of the true import of an Act of Congress, to wit: the Truth-in-Lending Act.

For all of the reasons stated above, it is respectfully submitted that the judgment of the Court below should be reversed in its entirety and that this suit should be dismissed. It is further respectfully submitted that the Court should hold that the Pennsylvania statutes and rules of procedure which are the subject of this appeal are

¹⁷ It is especially noteworthy that appellants are attacking Pennsylvania Rules of Civil Procedure 2950 to 2976. These Rules became effective on January 1, 1970, whereas this suit was commenced in December 1969. There has been no showing that any of the plaintiff-appellants has been aggrieved, in any manner, by any process under these Rules. Consideration of these Rules should not be before this Court.

constitutionally valid and consistent with substantive and procedural due process under the fourteenth amendment of the United States Constitution.

Finally, it is respectfully submitted that the informed use of a consensual judgment, entered by confession, for the purpose of securing a credit transaction "for provident or productive purposes" is totally consistent with substantive and procedural due process, and that this Court should so hold.

Respectfully submitted

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APPENDIX "A"

**The challenged Statutes and Rules of Civil Procedure of
the Commonwealth of Pennsylvania.**

STATUTES AND RULES

The Act of April 14, 1834, Pa. Stat. 333, 377, 17 P.S. § 1482 (1962) provides as follows:

"The prothonotaries and clerks aforesaid shall have and exercise, respectively, in the courts to which they severally belong, and with full effect in term time and vacation, the powers and authorities following, to wit: They shall have power

I. To sign and affix the seal of the respective court to all writs and process, and also to the exemplifications of all records and process therein.

II. To take bail in civil actions depending in the respective court.

III. To enter judgments at the instance of plaintiffs, upon the confession of defendants.

IV. To sign all judgments.

V. To take the acknowledgment of satisfaction of judgments or decrees entered on the record of the respective court.

VI. To administer oaths and affirmations in conducting the business of their respective offices."

The Act of February 24, 1806, Pa. Stat. 334, 4 Sm.L. 270, § 28, as amended, 12 P.S. § 739 (Supp. 1970) provides as follows:

"It shall be the duty of the prothonotary of any court of record, within this Commonwealth, on the application of any person being the original holder (or assignee of such holder) of a note, bond, or other instrument of writing, in which judgment is confessed, or containing a warrant for an attorney at law, or other person to confess judgment, to enter judgment

against the person or persons, who executed the same for the amount, which, from the face of the instrument, may appear to be due, without the agency of an attorney, or declaration filed, with such stay of execution as may be therein mentioned, for the fee of one dollar, to be paid by the defendant; particularly entering on his docket the date and tenor of the instrument of writing, on which the judgment may be founded, which shall have the same force and effect, as if a declaration had been filed, and judgment confessed by an attorney, or judgment obtained in open court, and in term time; and the defendant shall not be compelled to pay any costs, or fee to the plaintiff's attorney, when judgment is entered on any instrument of writing as aforesaid.

In the County of Philadelphia, when the amount appearing to be due is not more than the maximum amount over which the Municipal Court has original jurisdiction, the judgment shall be filed and docketed in the municipal court."

The Act of March 21, 1806, Pa. Stat. 558, 4 Sm.L. 326, § 8, as amended, 12 P.S. § 738 (Supp. 1970), provides as follows:

"It shall be the duty of the prothonotaries, respectively, on the application of any persons willing to become parties in the amicable suit, to enter the same without the agency of an attorney, and when thereunto required, and on confession in writing, executed in presence of two or more witnesses, expressing the amount due to the plaintiff, (which confession shall be filed in his office), he shall enter judgment against the defendant, for the amount expressed as aforesaid, with stay of execution as may be agreed upon by the parties and the prothonotary shall receive fifty cents, for every such entry, to be paid by the defendant in

the suit, and when any suit is ended, the clerk of the court before which it was pending, shall on the request of the plaintiff expressed in writing, enter satisfaction thereon.

In the County of Philadelphia, when the amount of the judgment is not more than the maximum amount over which the Municipal Court has original jurisdiction, the judgment shall be entered in the Municipal Court."

Pennsylvania Rules of Civil Procedure 2950 to 2976 provide as follows:

Rule 2950. Definition.

As used in this chapter

"action" means a proceeding to enter a judgment by confession for money pursuant to an instrument authorizing such confession.

Rule 2951. Methods of Proceeding.

(a) Judgments by confession may be entered by the prothonotary, as authorized by the Act of February 24, 1806, P.L. 334, 4 Sm.L. 270, § 28, as amended, 12 P.S. 739, without the agency of an attorney and without the filing of a complaint, declaration or confession, for the amount which may appear to be due from the face of the instrument. The judgment may include interest computable from the face of the instrument.

(b) An action which is not filed under the Act of February 24, 1806, P.L. 334, 4 Sm.L. 270, § 28, as amended 12 P.S. 739, shall be commenced by filing with the prothonotary a complaint substantially in the form provided by Rule 2952. Even though the instrument is one on which judgment could be entered by the prothonotary under the Act of 1806, the plaintiff may commence the action by filing a complaint.

(c) If the instrument is more than ten (10) years old or if the original cannot be produced for filing or if it requires the occurrence of a default or condition precedent before judgment may be entered, the occurrence of which cannot be ascertained from the instrument itself, the action must be brought under Subdivision (b).

(d) If the instrument is more than twenty (20) years old, judgment may be entered only by leave of court after notice and the filing of a complaint under subdivision (b).

(e) When the plaintiff proceeds under Subdivision (b) and the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature is not attached to the complaint, judgment may be entered only by leave of court after notice.

Rule 2952. Complaint. Contents.

The complaint shall contain the following:

(a) the names and last known addresses of the parties;

(b) the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature; if the original is not attached, an averment that the copy attached is a true and correct reproduction of the original; if neither the original nor a reproduction can be attached, an explanation why they are not available;

(c) a statement of any assignment of the instrument;

(d) either a statement that judgment has not been entered on the instrument in any jurisdiction or if

it has been entered an identification of the proceedings;

(e) if the judgment may be entered only after a default or the occurrence of a condition precedent, an averment of the default or of the occurrence of the condition precedent;

(f) an itemization of the amount then due, which may include interest and attorneys' fees authorized by the instrument;

(g) a demand for judgment as authorized by the warrant;

(h) if the instrument is more than twenty (20) years old, or if the original or a photostatic copy or like reproduction of the instrument showing the defendant's signature is not attached to the complaint, an application for a court order granting leave to enter judgment after notice;

(i) signature and verification in accordance with the rule relating to the action of assumpsit.

Rule 2953. Successive Actions.

(a) Where an instrument authorizes judgments to be confessed from time to time for separate sums as or after they become due, successive actions may be commenced and judgments entered for such sums.

(b) If an instrument authorizes entry of judgments for money and in ejectment, the entry of judgment in ejectment shall not prevent the entry of judgment for money.

Rule 2954. Judgment in Name of Holder, Assignee or Transferee.

Judgment shall be entered only in the name of a holder, assignee or other transferee.

Rule 2955. Confession of Judgment.

(a) In an action commenced by a complaint under Rule 2951(b), the plaintiff shall file with the complaint a confession of judgment substantially in the form provided by Rule 2962.

(b) The attorney for the plaintiff may sign the confession as attorney for the defendant unless an Act of Assembly or the instrument provides otherwise.

Rule 2956. Entry of Judgment.

The prothonotary shall enter judgment in conformity with the confession.

Rule 2957. Execution. Amount. Items Claimed.

Plaintiff may include the amount due, interest, attorneys' fees and costs in his praecipe for a writ of execution under Rule 3251(5). However, where judgment has been entered under Rule 2951(a) and there has been a record appearance of counsel at any stage of the proceedings and attorneys' fees are authorized in the instrument, these fees may be included in the praecipe for a writ of execution in whole or in part to the extent that the total amount claimed, excluding interest, does not exceed the amount of the judgment.

Rule 2958. Execution. Notice of Entry of Judgment.

(a) Within twenty (20) days after the entry of judgment the plaintiff shall mail to the defendant, by ordinary mail addressed to the defendant at his last known address, written notice of the entry setting forth the date, the court, term and number and the amount of the judgment, and file with the prothonotary an affidavit of mailing of the notice. Failure to mail the notice or file the affidavit shall not affect the lien of the judgment.

(b) Within twenty (20) days after the entry of judgment the plaintiff may issue a writ of execution even if the notice has not yet been mailed and the affidavit of mailing has not yet been filed. The lien of any levy or attachment made pursuant to such a writ within or after the twenty (20) day period shall be valid. However, no further proceedings may be had pursuant to such writ until twenty (20) days after the notice has been mailed and the affidavit of mailing has been filed.

(c) If no affidavit has been filed within the twenty (20) day period after the entry of judgment, no writ of execution may be issued thereafter until twenty (20) days after the affidavit of mailing has been filed.

(d) At the time of the issuance of a writ of execution upon a judgment entered by confession the prothonotary shall endorse thereon the date of the judgment, the judgment was entered by confession and if an affidavit of mailing has been filed the date of the filing of the affidavit.

(e) No waiver of notice or of the filing of the affidavit of mailing shall be valid.

**Rule 2959. Striking Off of Opening Judgment.
Pleadings. Procedure.**

(a) Relief from a judgment by confession shall be sought by petition. All grounds for relief whether to strike off the judgment or to open it must be asserted in a single petition.

(b) If the petition states prima facie grounds for relief the court shall issue a rule to show cause and may grant a stay of proceedings. After being served with a copy of the petition the plaintiff shall file an answer on or before the return day of the rule. The return day of the rule shall be fixed by the court by general rule or special order.

(c) A party waives all defenses and objections which he does not include in his petition or answer.

(d) The petition and the rule to show cause shall be served as provided in Rule 233, and the answer as provided in Rule 1027.

(e) The court shall dispose of the rule on petition and answer, and any testimony, depositions, admissions and other evidence. The court for the cause shown may stay proceedings on the petition insofar as it seeks to open the judgment pending disposition of the application to strike off the judgment.

Rule 2960. Proceedings Upon Opening of Judgment. Pleadings.

If a judgment is opened in whole or in part the issues to be tried shall be defined by the complaint if a complaint has been filed, and by the petition, answer and the order of the court opening the judgment. There shall be no further pleadings.

Rule 2961. Effective Date. Pending Actions.

These rules shall become effective on the first day of January, 1970. These rules shall apply only to actions commenced after the effective date except Rules 2959 and 2960 which also apply to judgments theretofore entered.

Rule 2962. Confession of Judgment Where Action Commenced by Complaint.

[CAPTION]

Pursuant to the authority contained in the warrant of attorney, the original or a copy of which is attached to the complaint filed in this action, I appear for the

defendant(s) and confess judgment in favor of the plaintiff(s) and against defendant(s) as follows:

- (Principal) • (Penal) Sum \$ _____
- Other authorized items: _____ \$ _____
- _____ (Specify) _____
- Interest \$ _____
- Attorney fees \$ _____
- Strike out inapplicable item.
- Interest and attorney fees may be included only if authorized by the warrant.

(Attorney for Defendant(s))

Rule 2970. Conformity.

Except as otherwise provided in this chapter, the procedure in an action to enter a judgment in ejectment for possession of real property by confession pursuant to an instrument authorizing such confession shall be in accordance with the rules relating to confession of judgment for money.

Rule 2971. Commencement of Action.

(a) An action shall be commenced by filing with the prothonotary a complaint substantially in the form provided by Rule 2952. The complaint shall also contain a description of the property and a demand for judgment in ejectment.

(b) The plaintiff shall file with the complaint a confession of judgment substantially in the form provided by Rule 2974.

Rule 2972. Successive Actions.

If an instrument authorizes judgment to be entered in ejectment and for money, the entry of judgment for money shall not prevent the entry of judgment in ejectment.

Rule 2973. Effective Date. Pending Actions.

These rules shall become effective on the first day of January, 1970. These rules shall apply only to actions commenced after the effective date except Rules 2959 and 2960 which also apply to judgments theretofore entered.

Rule 2974. Confession of Judgment.**[CAPTION]**

Pursuant to the authority contained in the warrant of attorney, the original or a copy of which is attached to the complaint filed in this action, I appear for the defendant(s) and confess judgment in ejectment in favor of the plaintiff(s) and against the defendant(s) for possession of the real property described as follows:

(Description)

 (Attorney for Defendant(s))

Rule 2975. Acts of Assembly Not Suspended.

These rules governing Confession of Judgment for Money or for Possession of Real Property shall not be deemed to suspend or affect:

(1) Section 2 of the Act approved March 21, 1772, 1 Sm.L 389, § 2, 12 P.S. 742.

(2) Section 28 of the Act approved February 24, 1806, P.L. 334, 4 Sm.L 270, as amended by the Act of June 10, 1957, P.L. 281, No. 142, 12 P.S. 739, insofar as it relates to the power of the prothonotary to enter confessed judgments without the intervention of an attorney or the filing of a complaint.

(3) Section 40 of the Act approved March 28, 1827, P.L. 154, 17 P.S. 1903.

(4) Section 40 of the Act approved June 13, 1836, P.L. 568, 12 P.S. 316.

(5) Section 1 of the Act approved April 21, 1846, P.L. 424, 12 P.S. 1555.

(6) Section 11 of the Act approved March 23, 1853, P.L. 706, 17 P.S. 1921.

(7) Section 3 of the Act approved April 22, 1856, P.L. 532, 17 P.S. 1922.

(8) Section 1 of the Act approved March 14, 1876, P.L. 7, 12 P.S. 978.

(9) Section 1 of the Act approved May 26, 1897, P.L. 94, 12 P.S. 740.

(10) Sections 1 and 2 of the Act approved May 17, 1929, P.L. 1804, as amended June 25, 1937, P.L. 2325, 12 P.S. 743, 744.

(11) Section 1 of the Act approved June 10, 1935, P.L. 295, No. 129, 12 P.S. 745.

(12) Section 1 of the Act approved March 27, 1945, P.L. 83, as amended July 13, 1961, P.L. 592, 12 P.S. 913, except insofar as it conflicts with Supreme Court Rule 14 relating to local office or address of attorneys within the county.

(13) Sections 2 and 3 of the Act approved June 28, 1951, P.L. 927, 68 P.S. 602, 603.

Rule 2976. Acts of Assembly Suspended.

The following Acts of Assembly are suspended insofar as they apply to the practice and procedure in actions to confess judgment for money or for possession of real property as defined in these rules, entered in any court which is subject to these rules.

(1) Section 28 of the Act approved February 24, 1806, P.L. 334, 4 Sm.L. 270, 12 P.S. 739, as amended by the Act of June 10, 1957, P.L. 281 No. 142, only insofar as it may be inconsistent with these rules.

(2) Section 8 of the Act approved March 21, 1806, P.L. 558, 4 Sm.L. 326, 12 P.S. 738.

(3) Section 1 of the Act approved July 9, 1897, P.L. 237, 12 P.S. 911, except insofar as it relates to preservation of the lien of judgment pending proceedings to open or strike.

(4) Section 2 of the Act approved July 9, 1897, P.L. 237, 12 P.S. 912.

(5) AND all other Acts or parts of Acts inconsistent with these rules.

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**In the Supreme Court of the
United States**

October Term, 1970

No. ~~558~~

NELLIE SWARB et al.,

Appellants

v.

WILLIAM LENNOX et al.,

Appellees

*On Appeal From the United States District Court
for the Eastern District of Pennsylvania.*

**BRIEF FOR THE COMMONWEALTH
OF PENNSYLVANIA-APPELLEE**

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STATEMENT

On December 23, 1969, suit was commenced in this action by plaintiffs in the United States District Court for the Eastern District of Pennsylvania. Motions were made for temporary and preliminary injunctions and, accordingly, notice of the pending of this action and attendant motions was served on the prior Attorney General of the Commonwealth of Pennsylvania pursuant to 28 U.S.C. §2284. At the hearing on the preliminary injunction, Herbert Monheit, Esquire, Assistant Attorney General, appeared on behalf of the Commonwealth and the prior Attorney General and filed a brief against plaintiffs raising questions of jurisdiction. The prior Attorney General did not become substantially involved in this case again until October, 1970, when the Deputy Clerk, of the United States Supreme Court sent a letter to him requesting him to determine if he would continue participation. Earlier in August, 1970, the former Pennsylvania Attorney General had been served with a copy of the appellant's jurisdictional statement. In December, 1970, the prior Attorney General indicated to the Chief Deputy Clerk of this Court that the Commonwealth would not participate in this appeal.

Subsequently, the prior administration terminated office on January 20, 1971, and the present administration took office. Shortly thereafter, the new administration determined that it would be in the best interest of the citizens of the Commonwealth to par-

ticipate in this case on behalf of the appellants. In April, 1971, the present Attorney General filed and sent to this Court its notice of appearance, a memorandum in support of appellants' application for a stay, and certificate of service.

This case presents the question of whether the statutes and rules of Pennsylvania authorizing and establishing the procedure of confession of judgment are unconstitutional on their face in violation of the due process clause of the Fourteenth Amendment. The Court below held that these statutes and rules were unconstitutional when used against obligors who made less than \$10,000 per year and had signed a contract containing a confession of judgment clause in connection with purchases of goods and services at retail. The Court below, however, ruled that these same statutes and rules were not unconstitutional when used against obligors who made more than \$10,000 per year or who had signed an instrument accompanying a mortgage and containing a confession of judgment clause.

Confession of judgment has been a practice engaged in for over one hundred and sixty years in the Commonwealth of Pennsylvania. Beyond its longevity, the practice has little to commend it. As ably described in appellants' brief and the brief *amicus* of The National Consumer Law Center, an obligor who signs an instrument in Pennsylvania containing a confession of judgment clause may have a judgment entered against him without notice or opportunity to be heard on any of the growing number of defenses he may assert against the obligee under this same procedure. The only remedy afforded to the obligor to ex-

tricate himself from the confessed judgment is the so-called petition to strike or open the judgment. This petition is addressed to the discretion of the Court sitting in equity, imposes the burden on the obligor to establish the right to have the judgment stricken or opened, is costly and manifestly inadequate. See *Swarb et al. v. Lennox et al.*, 314 F. Supp. 1081, at p. 1096 (E.D. Pa. 1970).

The confession of judgment procedure in Pennsylvania described above has a tantalizing simplicity, swiftness and certitude but it ignores fundamental due process rights of notice and opportunity to be heard for the consumer. It is the view of the Department of Justice of the Commonwealth that it is the duty of this government to assure that these fundamental rights are enforced and protected. To illustrate the problems created by confession of judgment this Court is respectfully referred to the testimony of Detective Thomas Veney, a law enforcement officer of the County of Philadelphia and the Commonwealth. He and his office have been the recipients of numerous consumer complaints and grievances which have become all the more tension ridden when the aggrieved consumer is told that he had "confessed judgment" and that there are no remedies available which afford him his day in Court. Additionally, the Court's attention is directed to the monumental work of the National Advisory Commission on Civil Disorders; a work to which law enforcement officers and Attorneys General throughout the country do or should pay heed. The report refers specifically to confession of judgment as being one of those practices which seem particularly iniquitous to the poor of our society and

makes a mockery of the Anglo-American legal tradition that every man is to have his day in Court. *Report of the National Advisory Commission on Civil Disorders*, U. S. Government Printing Office, 1968, at pp. 92, 113, 139-41.

Finally, as the officer of the Commonwealth charged with the direction and supervision of the Pennsylvania Bureau of Consumer Protection, this office has noted that the rights and protection of all, not just the poor, citizens of this Commonwealth are being expanded to protect their interests as home purchasers, consumers and lessees. The confession of judgment procedure described above denying obligors notice and opportunity to be heard or to assert any of their defenses makes unenforceable any of these newly created rights.

The present Attorney General, therefore, respectfully submits that the statutes and rules of Pennsylvania authorizing confession of judgment are unconstitutional on their face and the Court below erred in ruling that these statutes and rules are not unconstitutional in instances where the obligor signing the confession of judgment clause earns more than \$10,000 per year or signs the clause in connection with a mortgage.

ARGUMENT

There Being No Method of Assuring That the Requisite Waiver of Constitutionally Protected Rights Has Occurred Under the Confession of Judgment, Statutes and Rules, the Statutes and Rules Are Unconstitutional on Their Face

As noted above, the Court below held that the confession of judgment statutes and rules were not unconstitutional in those instances where the obligor makes \$10,000 per year or signs an instrument containing a confession of judgment clause accompanying a mortgage. In so ruling, the Court held that the statutes and rules were not unconstitutional on their face. This ruling is clearly erroneous and ignores the major constitutional defects of confession of judgment whenever and to whomever applied.

It is well established that two fundamental prerequisites of due process under the Fourteenth Amendment (U. S. Constitution, Amendment XIV) are notice and opportunity to be heard. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1949); *Wuchter v. Pizzutti*, 276 U.S. 13 (1928); *Armstrong v. Manzo*, 380 U.S. 545 (1965); *Sniadach v. Family Finance Co.*, 395 U.S. 337 (1969); and *Bell v. Burson*, 39 U.S.L.W. 4607 (U.S. May 24, 1971). Most especially, these rights cannot be waived unless there are carefully devised safeguards surrounding the waiver to assure that the waiver was knowing and volun-

tary. An analysis of the statutes and rules here questioned discloses no such safeguards. Failure to provide such safeguards in any and all of the situations in which confession of judgment is authorized makes the statutes and rules unconstitutional on their face.

In the transaction typical of those in which the Court below permitted the continued use of confession of judgment, the obligor will sign a contract or instrument accompanying a mortgage containing a confession of judgment clause. A form of such a clause appears at p. 12 of appellants' brief, footnote 1. As will be discussed more fully in point II below, the contract or instrument in which the clause appears is a form contract of adhesion. The statutes and rules permit the obligee on the contract or instrument and require the prothonotary to enter the judgment immediately regardless of whether default has occurred. The judgment entered acts as a lien on the obligor's property. Rule 2958(a) of the Pennsylvania Rules of Civil Procedure. At this stage of the proceeding the obligor has an outstanding judgment against him and, of course, has not received formal notice or been given an opportunity to contest the underlying claim. Ironically, at this time, the obligor may have first discovered that the obligee breached the terms of the contract, imposed excessive finance charges, breached a warranty or even committed fraud.

Moreover, the obligee under the statutes and rules can proceed to execute on the judgment, again in *ex parte* proceedings. By the mere filing with the prothonotary of an averment that default has occurred a writ of execution must be issued. Notice of entry of the judgment may be mailed to the obligor at this time

if the sheriff's sale is to be held, although the usual practice is to serve the notice of entry with the writ of execution. Again, the obligor is not given the opportunity to present his defenses to any court and his plight is all the more serious because he is faced with imminent sale of his property.

It stretches credulity to surmise that any person voluntarily waived his rights to notice and hearing, fully comprehending the consequences of his act in signing a confession of judgment clause.

The obligor cannot waive defenses he cannot foresee and at the time of the execution of the contract he may not, and in more instances does not, foresee the myriad of legal claims he may have against the obligee arising out of the transaction. Moreover, there will be no way for any court to determine in those rare instances, if there are any, whether or not the obligor was fully apprised of the consequences of signing a confession of judgment clause and did so voluntarily.

This Court has stated on numerous occasions that waiver of the fundamental constitutional rights will not lightly be inferred. *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Brady v. United States*, 397 U.S. 742 (1970); *Miranda v. Arizona*, 384 U.S. 436 (1966).

The clear meaning of those cases is that there must be a mechanism within the legal process that assures a court that the waiver occurred knowingly and voluntarily. In *Wuchter v. Pizzutti*, supra, this Court was faced with the question of whether the New Jersey Non-Resident Motor Vehicle Statute accorded due process to non-residents sued in New Jersey Courts

when the statute made no provision that notice of the pending action be served on the non-resident defendant.

'In view of the fact that no provision for notice was set forth in the statute, this Court held that the statute denied due process of law to the defendant notwithstanding the fact that defendant received actual notice of the pendency of the action against him.

In so holding this Court stated at 19:

"... the enforced acceptance of the service of process on a state officer by the defendant would not be fair or due process unless such officer or the plaintiff is required to mail the notice to the defendant, or to advise him; by some written communication, so as to make it reasonably probable that he will receive actual notice. Otherwise, where the service of summons is limited to a service on the Secretary of State or some officer of the state, without more, it will be entirely possible for a person injured to sue any non-resident he chooses, and through service upon the state official obtain a default judgment against a non-resident who has never been in the state, who had nothing to do with the accident, or whose automobile having been in the state has never injured anybody. A provision of law for service that leaves open such a clear opportunity for the commission of fraud (*Heinemann v. Pier*, 110 Wis. 185) or injustice is not a reasonable provision, and in the case supposed would certainly be depriving a defendant of his property without due process of law."

In *Mullane v. Central Hanover Bank*, supra, this Court was faced with the question of the constitutionality of the New York Common Trust Fund Statute. Under the provisions of that Act the trustee of common trust funds was permitted to serve notice of an action for an accounting on all beneficiaries, both immediate and remote, by publication in a New York newspaper. With regard to the notice provisions of the statute permitting service by publication on all immediate beneficiaries whose names and addresses were in the possession of the trustee, this Court held those provisions unconstitutional. As in *Wuchter v. Pizzutti*, supra, there was no reasonable provision in the statute to assure that the right to notice had been protected.

Finally, in a case almost identical to the case at bar, the District Court in Delaware declared the confession of judgment statute of Delaware unconstitutional on its face. *Osmond v. Spence*, — F. Supp. —, 39 L.W. 2660 (D. Del., 1971).

Judge Layton in discussing deficiencies of the Delaware procedure in assuring safeguards as to the question of requisite waiver stated at 2661,

“We conclude then, that the Delaware statutory scheme here under attack is fatally defective in that, by failing to provide for notice and hearing preceding entry of judgment, there is no method of judicially determining whether or not a particular debtor knowingly and intelligently signed the judgment note thereby waiving his 14th amendment rights. So that, even conceding as we do, that there may be a substantial number

of persons . . . who do sign such notes with a full realization of the legal effect of their acts, it remains that the Delaware practice furnishes no judicial means for separating the case of those persons who have knowingly and intelligently waived from those who have not."

The Strong Presumption Against a Waiver of One's Constitutional Rights Was Not Overcome in the Court Below. Therefore the Statutes and Rules Are Unconstitutional on Their Face

This Court has carefully scrutinized those situations in which there have been purported waivers of constitutional rights. In the landmark case, *Johnson v. Zerbst*, 304 U.S. 458 (1938), the Court states at 464:

"It has been pointed out that 'courts indulge every reasonable presumption against waiver' of fundamental constitutional rights and that we 'do not presume acquiescence in the loss of fundamental rights'. A waiver is ordinarily an intentional relinquishment or abandonment of a known right of privilege."¹

The confession of judgment procedure as it applies to all citizens of the Commonwealth of Pennsylvania,

¹ That the principles established in *Johnson v. Zerbst* apply to civil cases as well as criminal matters is made clear in *Ohio Bell Telephone Co. v. Public Utilities Commission*, 301 U.S. 292, 307 (1937), where the Court declares: "We do not presume acquiescence in the loss of fundamental rights." See also *Aetna Insurance Company v. Kennedy*, 301 U.S. 389, 393 (1937).

induces consent to an ex parte proceeding where judgment is rendered without any determination of the merits of the claim, and thereby, constitutes a waiver of due process rights. The Court in *Brady v. United States*, 397 U.S. 742 (1970), stated at 748:

"Waivers of constitutional rights not only must be voluntary but must be knowing, intelligent acts, done with sufficient awareness of the relevant circumstances and likely consequences."

See also *Brookhart v. Janis*, 384 U.S. 1 (1966).

Where persons are compelled to sign agreements containing the ubiquitous confession of judgment clause,² the affixation of one's signature to an agreement waiving due process rights can hardly be said to be voluntary. See *Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A. 2d 69 (1960). The question of voluntariness has been considered by this Court frequently and in some detail. Recently, the Court has held that waivers of one's constitutional rights were without effect because such waivers were not voluntary. See *Bumper v. North Carolina*, 391 U.S. 543 (1968), and *Miranda v. Arizona*, 384 U.S. 436 (1966). In *Garrity v. New Jersey*, 385 U.S. 793,

² For information on the pervasive use of confession of judgment notes, see Hobson, *Cognovit Judgments. An ignored problem of due process on full faith and credit*, 29 U. Chi. L. Rev. 111 (1961); Schuchman, *Consumer Credit by Adhesion Contracts*, 35 Temp. L.Q. 125 (1962); Tanner, *Uniformity of Judgment Notes in Pennsylvania*, 44 Dick. L. Rev. 173 (1940); Comment, *Abolition of the Confession of Judgment Note in Retail Installment Sales Contracts in Pennsylvania*, 72 Dick. L. Rev. 115 (1968); Note, *Confessions of Judgment*, 102 Pa. L. Rev. 524 (1954).

798 (1967), this Court stated that there can be no waiver when the element of choice is, in reality, one "between the rock and the whirlpool". It is precisely this kind of choice that is the only one available to a consumer who enters into a credit transaction in Pennsylvania. Consequently, the borrower either adheres to the terms set forth or goes without the credit. The interest in maintaining an equal bargaining position between parties to a contract is violated and a contract of adhesion results.

A contract of adhesion is one in which a standard contract is drafted unilaterally by a dominant party and presented to the weaker party as the only acceptable instrument. Ehrenzweig, *Adhesion Contract in Conflict of Laws*, 53 Colum. L. Rev. 1072, 1074 (1953). These contracts are most prevalent in consumer credit transactions, where the borrower must have the credit and, therefore, is forced to accept the terms presented. Schuchman, *Consumer Credit by Adhesion Contract*, 35 Temple L.Q. 129 (1962). It is inaccurate, therefore, to term such transactions as contractual in the strict sense of the word. A contract is an "agreement between two . . . parties . . . in which minds of parties meet and concur in [the] understanding of terms." Black's Law Dictionary, revised 4th ed., p. 394. Adhesion contracts of this type, *supra*, do not provide for a meeting of the minds, in that the inferior party has no choice as to alternative contracts containing varying terms, but is forced to accept the agreement as it stands or forego the use of credit altogether. Thus, the defense raised that there is a consent to waive one's constitutional rights is a myth. Comment, *Abolition of the Confession of*

Judgment Note in Retail Installment Sales Contracts in Pennsylvania, 72 Dick. L. Rev. 115, 117-118 (1968). This applies to members of all economic classes. If there are no terms to be agreed upon, there is no meeting of the minds and, consequently, there can be no consent to any waiver of constitutional rights, but merely an involuntary acquiescence to a contract of adhesion.

The Court below has effectively circumvented the presumption against waiver of constitutional rights for a large segment of Pennsylvanians. In the lower Court's decision, the key concept discussed, in relation to waiver, was "understanding". *Swarb et al. v. Lennox et al.*, 314 F. Supp. at 1100-01. In focusing on the question of whether there was an understanding or knowing waiver, the District Court overlooked question of voluntariness, the other prerequisite of constitutional waiver, and disregarded major portions of the record. Alan Kasnoff, a witness for plaintiffs, in uncontradicted testimony said that confession of judgment clauses were used in almost every mortgage transaction he was acquainted with, and Detective Veney testified that 95% of the people he had interviewed had signed instruments containing confession of judgment clauses. Defendants stipulated that all of the contracts used by their clients contained such a clause. The defendants offered no evidence to contradict this proof.

On the basis of this record the Court below clearly should have found as fact that use of confession of judgment clauses was pervasive throughout Pennsylvania and incorporated in form contracts of adhesion.

The proof appears so overwhelming that this fact may also have been appropriately subject to judicial notice. See *Santiago v. McElroy*, 319 F. Supp. 284 (E.D. Pa. 1970), where the court took judicial notice of the fact that form leases were adhesion contracts.

At the very least, plaintiffs' proof, the operation of the presumption and the absence of any contradictory evidence clearly established plaintiffs' right to relief for all members of the class they claimed to represent, including those persons making more than \$10,000 per year and signing instruments containing confession of judgment clauses accompanying mortgages.

The Court Below Improperly Applied the Federal Rules of Civil Procedure To Confine Its Ruling to a Limited Sub-Class of Individuals

The Court below relied on Fed. R. Civ. P. 23 to limit relief to a distinct sub-class of individuals.¹ The decision failed to declare judgment notes unconstitutional for those persons with incomes in excess of \$10,000 and for those who sign bonds and warrants of attorney accompanying mortgages. The Court justified the income limitation on the ground that there was no showing that appellants brought the class action as "representative parties who fairly and adequately protect the interest of persons signing con-

¹ The Court in 314 F. Supp. 1091, at 1098, n. 18 held "Fed. R. Civ. P. 23(c)(4) contemplates that relief may be granted to a sub-class of those instituting the action and as to particular issues."

fession of judgment notes who have incomes of over \$10,000." 314 F. Supp. 1098-99. The Court further reasoned that appellants did not produce sufficient evidence indicating that persons who sign bonds and warrants of attorney accompanying mortgages did not consent to the confession of judgment procedure. 314 F. Supp. 1099.

Appellants brought this class action on behalf of all "individual natural" Pennsylvania residents "who have signed contracts authorizing . . . judgments to be entered against them," under the confession of judgment statutes and rules. 310 F. Supp. 1098. To be maintainable as a class action, a suit must meet the requirements enumerated in Section (a) of Fed. R. Civ. P. 23 and also must fall within one of the subsections of Rule 23(b). Rule 23(a), as amended in 1966, provides as follows:

"One or more members of a class may sue . . . as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims . . . of the representative parties are typical of the claims . . . of the class, and (4) the representative parties will fairly and adequately protect the interests of the class."

The Court below did not contest the first three requirements of Section (a) of the Rule; the size of the class, the common nature of questions of fact or law, and the claim of the parties being typical of claims of the class. The Court's one objection under Rule 23(a) is that the appellants do not fairly and

adequately represent the interest of those persons within the original class who have incomes in excess of \$10,000 or who sign bonds or warrants of attorney accompanying mortgages.²

The Court's reasoning for holding that appellants did not fairly and adequately represent the above mentioned "sub-classes" is twofold: first, the Court expressly found an inadequate number of representatives for these sub-classes, 314 F. Supp. 1098; second, the Court impliedly determined there was a conflict of interest between those who earn over \$10,000 and those who earn less than \$10,000, 314 F. Supp. 1099.

In holding that since only four percent of the Caplovitz study earned in excess of \$10,000 the appellants did not properly represent those persons with incomes above that sum, the Court ignored the well established interpretation of Rule 23. In *Epstein v. Weiss*, 50 F.R.D. 387 (E.D. La. 1970), the Court held, at 391:

"It is now well settled that neither the number of representative parties nor their financial interests is controlling in determining whether the plaintiffs will fairly and adequately protect the interests of their class. Thus, a single plaintiff may represent the entire class . . . if other factors indicate that he will fairly and adequately protect the interests of his class."

² It is well established that the Federal Rules of Civil Procedure are to be construed in a liberal manner to accord substantial justice over mere technical contentions: See *U.S. v. Nutrition Service, Inc.*, 234 F. Supp. 578 (W.D. Pa. 1964), affirmed 347 F. 2d 233; *Schaedler v. Reading Eagle Publication, Inc.*, 370 F. 2d 795. (Cir. Pa. 1967).

See also *Eisen v. Carlisle & Jacquelin*, 391 F. 2d 555 (2nd Cir. 1968). It is obvious, therefore, that the number of persons coming forward to protect the interests of a class is not determinative of adequacy of representation.

As noted above the Court below went on to hold that the abolition of judgment notes would increase the difficulty for persons earning over \$10,000 to secure credit and, therefore, it would not extend these possible consequences to such a class of individuals, whom it deemed were not adequately represented by named plaintiffs, 314 E. Supp. 1099. This reasoning establishes an obscure conflict of interest between individuals of different income levels as a basis for the severe limitations placed on appellants class action suit. It is submitted that there cannot be any serious conflict of interests between any class or sub-class concerning the protection of due process rights, and whatever diverse interest that might possibly exist in the present case is conjecture and *de minimis*.³ The predominant issue before the court was the violation of due process rights and the securement of credit cannot be such a substantial conflict of interest that it would defeat the appellants class action. The courts have held that for a conflict of interest to compromise

³ The Advisory Committee on Rules in the notes on Fed. R. Civ. P. 23 would not agree to such a severe limitation of the class action brought by appellants. Where there is a common issue (violation of due process) a single class action may be brought and the class should not be divided into sub-classes unless there are diverse interests. See Notes of Advisory Committee on Rule 23(c) (4), 28 U.S.C.A. pocket part, p. 89.

a class action suit, it must be one involving the very issue in litigation. See *Berman v. Narragansett Assoc.*, 414 F. 2d 311 (1st Cir. 1969), cert. den. 396 U.S. 1037; *Mersey v. First Republic Corp. of America*, 43 F.R.D. 465 (S.D.N.Y. 1968). It is also reasonable to assume that if any party is to be handicapped by a removal of protections afforded to creditors, the individuals having low incomes will suffer considerably more than those in the higher income brackets.

Even if it were concluded that a reasonable distinction can be made between those having incomes above and below \$10,000 annually, the Court erred in finding that sufficient evidence was not offered concerning those individuals having incomes in excess of \$10,000 annually. Only one witness, Plaintiff Doris Mims, confined her testimony to the factual situation surrounding those earning under \$10,000. Other witnesses, documents, and studies, while concentrating on the problems of the poor, made reference to the pervasiveness of the confession of judgment procedure.

In defining a separate sub-classification for individuals who sign mortgages accompanied by bonds and warrants, the Court sets forth three distinctions between these and other transactions. The Court notes the closing of most transactions at title company settlements; the existence of certain local rules available only in Philadelphia; and special requirements which exist under Regulation "Z" (12 C.F.R. 226ff) of the Fair Credit Reporting Act (Truth in Lending), 15 U.S.C.A. 1681-1681t. The issue of closings at title company settlements is an irrelevant

one. The documents signed at such settlement were introduced into evidence and there is evidence that these procedures do not differ significantly from any other. There was no evidence that such settlements differ in any relevant manner from those conducted by intervening defendants. In addition, a steadily increasing proportion of mortgage settlements do not take place at title company closings.

The distinctions based on the Philadelphia Common Pleas Court Rule 3129 * (f) (1) and Federal Regulation "Z" represent a clear misinterpretation of the law by the Court below. The local Philadelphia rule in question does not provide for notice of execution, but only for notice of entry of judgment in which notice may come at any time between the entry of judgment and the issuance of execution. Most important, the reference to Truth in Lending Regulation "Z" totally misinterprets that section of the regulation. The Court implies that the three day right of rescission exists only in situations where purchasers have signed mortgages accompanied by bonds and warrants. In fact, a careful reading of the section discloses that a rescission period exists in all cases where confessions have been taken, with the exception of confessions taken to secure the purchase of an individual's residence. The purchase of a residence was clearly uppermost in the Court's mind when it created an exception for mortgages.

**The Court Below Erred by Improperly Redrafting
Statutes and Rules Covering the Entry of Judgment
by Confession**

Mr. Justice Douglas speaking for this Court in *Sniadach v. Family Finance Corp. of Bay View*, 395 U.S. 337 (1969), stated that courts "do not sit as a super-legislative body." This, however, is exactly what the Court below did in holding that the statutes and rules covering confession of judgment in Pennsylvania were applicable in some cases, but not applicable in others. The court has, in effect, rewritten these statutes and rules so that they meet the court's test of constitutionality; a function reserved for the Legislature. The Supreme Court of Pennsylvania has recently refused to take such action in connection with a statute of its own State. In finding that the statute could not be upheld without adding conditions and corrections not contemplated by the Legislature, the Court stated in *State Board of Chiropractic Examiners v. Life Fellowship*, 441 Pa. 293 (1971), at 300:

"Conceivably the statute could be further rewritten so as to avoid constitutional infirmities. However, such a task lies properly with the Legislature for additional editing of Section 15 on our part would amount to judicial legislation."

In an earlier case discussing the issue of severability of statutes, the Pennsylvania Supreme Court noted:

"It is true that a statute or ordinance may be partially valid and partially invalid, and that if

the provisions are distinct and not so interwoven as to be inseparable, that the Courts should sustain the valid portions. . . . [citing cases]"

Saulsbury v. Bethlehem Steel Co., 413 Pa. 316, 320 (1964).

" . . . In determining severability of statutes or ordinances the legislative intent is of primary significance. However, the problem is twofold: the legislating body must have intended that the act or ordinance be separable and the statute or ordinance may be capable of separation in fact. The valid portion of the enactment must be independent and complete within itself. [citations omitted]"

Saulsbury v. Bethlehem Steel Co., supra, at 321.

Similarly, this Court has refused to sever statutory language when to do so would be to rewrite legislation of Congress or a State. *Marchetti v. United States*, 390 U.S. 39 (1968); *Williams v. Standard Oil Co.*, 278 U.S. 235 (1929).

The statutes and rules affecting confession of judgment have been in effect in Pennsylvania since 1806. During that time numerous amendments and changes have been made, but none has ever been used to limit the class of persons against whom judgments could be entered by confession. No ruling of the State Supreme Court or act of the Legislature in these long 165 years has indicated an intention to limit the effect of the statute in any way. The Court below has attempted to imagine what the state legislature would have done if the statute were ruled unconstitu-

tional as applied to certain classes of individuals, in direct contravention of an earlier decision of this Court. See *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936).

We do not request that this Court interpret Pennsylvania statutes any more than we want our Pennsylvania Supreme Court to act as a super-legislative body. The distinctive roles exercised by the Judiciary and the Legislature are quite well defined; therefore, we request this Court to rule that the Federal District Court invaded the province of the Legislature in arriving at its conclusion below.

CONCLUSION

For all of the reasons stated above, the Commonwealth of Pennsylvania joins with the Appellants in respectfully praying that the judgment of the Court below be reversed to the extent that it limits its declaration of unconstitutionality to certain specified classes of individuals, and that this Court enter a judgment declaring the Pennsylvania statutes and rules establishing the procedure of confession of judgment unconstitutional on their face.

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July 12, 1971

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IN THE
Supreme Court of the United States

October Term, 1970.

No. ~~538~~.

NELLIE SWARB, et al.,

Appellants,

v.

WILLIAM M. LENNOX, et al.,

Appellees.

**On Appeal From the United States District Court for the
Eastern District of Pennsylvania.**

**BRIEF OF AMICUS CURIAE
PENNSYLVANIA SAVINGS AND LOAN LEAGUE.**

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INTEREST OF *AMICUS CURIAE*, PENNSYLVANIA SAVINGS AND LOAN LEAGUE.

The Pennsylvania Savings and Loan League is an association of savings and loan institutions located throughout Pennsylvania. All parties have consented to the filing of this brief and the written forms of consent have been filed with the Clerk of the Supreme Court. In the court below an association known as The Insured Savings and Loan Associations of Philadelphia and Suburbs filed a brief as *amicus curiae* but, since the case has state-wide implications, the Pennsylvania Savings and Loan League was considered to be a more representative *amicus*.

The nature of the business of savings and loan associations is lending money for the purchase and development of real estate. In this connection, the common practice of the institutions represented by *Amicus* is to use a document called a "bond" or "bond and warrant" which evidences the debtor's promise to repay the loan, together with another document known as the mortgage which, upon recordation, constitutes a lien on the real estate providing security for the repayment of the debt. The "bond" or "bond and warrant" customarily contains an authorization to confess judgment against the debtor and, upon default, this authorization is used to obtain the judgment upon which execution will issue against the mortgaged real estate.

It should be noted here that savings and loan associations require that the mortgage be insured as a first lien upon the real estate securing repayment of the debt. Thus, there is always a "closing" or "settlement" of the loan conducted by a representative of the title insurance company insuring the lien of the mortgage. Typically, an attorney or real estate broker represents the buyer, who is borrowing money either to purchase real estate or improve it. Thus, professionals who have training and experience in the field are intimately involved in the bond and mort-

gage transaction and provide any explanations or assistance needed by the debtor in order to understand fully the terms of the documents he is asked to sign.

The constitutionality of all types of confession of judgment was challenged by appellants in the lower court and, although the attack on confession was successful as to certain types of transactions, the court was persuaded that there is no constitutional infirmity when the practice is used in bond and mortgage transactions. Accordingly, the court sustained the practice of confession as applied to bond and mortgage transactions. The court was persuaded that these transactions are materially different from many other types of consumer credit transactions. Moreover, the court concluded that the evidence submitted by appellants did not prove the existence of a class of persons which is being deprived of constitutional rights. The various safeguards surrounding bond and mortgage transactions prevent the abuses—real or imaginary—that appellants claim are present in other types of Pennsylvania credit transactions.

On this appeal, the Pennsylvania Savings and Loan League is seeking to sustain the practice of using confession of judgment clauses in bond and mortgage transactions. As of December 31, 1969, insured savings and loan associations in Philadelphia, Chester, Delaware, Bucks and Montgomery Counties had invested \$2,666,728,000 in first mortgages on real estate. In Philadelphia alone, the figure is \$1,622,029,000. Obviously, this is a critically important industry which is essential to the commerce and economic health of Pennsylvania. Also of significant interest is the fact that Philadelphia has the lowest mortgage interest rate of all major cities in the United States—a great benefit to the mortgage borrower.

Confessions of judgment are used in various types of instruments, e.g., leases, installment sales contracts, judgment notes, and bonds and warrants. Savings and loan

associations use confessions of judgment *only* in bonds and warrants accompanying mortgages, where the loan is used for the purchase or improvement of real estate, and the mortgage is given as security for repayment of the debt at the time the loan is made. The situation of these savings and loan associations is quite different from that of other creditors using confession of judgment.

SUMMARY OF ARGUMENT.

The Pennsylvania rules governing confession of judgment and execution give a mortgagor adequate notice and a fair opportunity to be heard on the merits of the underlying debt, by way of a petition to open the judgment, before he may be deprived of the use and enjoyment of his property. The petition to open judgment procedure is not unduly burdensome for the mortgage debtor; it is no more expensive than an ordinary complaint proceeding and the burden of proof is unchanged.

The Pennsylvania procedure comports with fundamental principles of fairness as have been heretofore established by the decisions of this Court and by common experience. This is not a case where a person is deprived of his sole means of support before having an opportunity to challenge in court the validity of the grounds alleged for so depriving him. In fact, nothing tangible is taken from the debtor before he is notified of the actions being taken against him and given a full and timely opportunity to have his "day in court". Pennsylvania has established a thorough procedure to guarantee that a debtor will not be deprived of his property without first having a minimum of twenty days' notice and an unrestricted opportunity to litigate his defenses in court. Thus, prior to losing possession of the property and prior to sale, the debtor is afforded a meaningful period of time within which to exercise his right to a judicial hearing.

Where property rights only are at stake, it has never been the law—except in unusual circumstances—that due process requires a hearing before judgment *so long as* a fair opportunity to be heard is provided at some meaningful stage of the proceedings. In the case of confession of judgment on bonds accompanying mortgages, no such unusual circumstances justifying an exception to the general

rule are present; on the contrary, there are valid and constitutionally sound reasons for affording mortgage creditors summary procedures for collecting delinquent debts. Furthermore, none of appellants' evidence on this point was directed to the circumstances presented when a debtor signs a bond and warrant accompanying a mortgage. Accordingly, the court below was correct in limiting the relief granted to the class of persons to which the evidence was addressed. The Pennsylvania confession of judgment procedure is not substantially different from the confession of judgment procedure in many other states and it is as fair as other forms of creditors' remedies found both in Pennsylvania and in other states.

Even if the Court finds that the Pennsylvania confession of judgment procedure infringes certain rights and thereby violates due process, such rights—like other constitutional rights—may be waived. But we submit that the confession of judgment procedure does not violate the Fourteenth Amendment, with or without a waiver.

ARGUMENT.**I. The Notice Requirements Imposed by the Pennsylvania Rules of Civil Procedure in a Confession of Judgment Proceeding Against a Mortgagor Satisfy the Due Process Requirements of the Fourteenth Amendment.**

The Pennsylvania Rules of Civil Procedure provide the mortgagor with many opportunities to be informed of the actions being taken against him before he may be deprived of his property in a confession of judgment proceeding. The mortgage debtor is given notice of the mortgagee's right to confess judgment, notice of the entry of judgment, notice of the issuance of a writ of execution and notice of the proposed sale.

In order to foreclose on a mortgage in a confession of judgment proceeding, the mortgagee must give the following notices to the mortgage debtor of the entry of judgment and the time and place of the Sheriff's Sale:

(1) Philadelphia Court of Common Pleas Rule 3129(f)(1) provides that no execution shall issue to sell the mortgaged property upon a judgment entered on a bond unless the plaintiff has first notified the mortgage debtor and the owner of the property by certified mail of the date of the entry of judgment, with the court, term and number thereof. The Pennsylvania Rules of Civil Procedure provide that within twenty days of the date of entry of judgment the plaintiff must notify the debtor by ordinary mail of the same facts as those contained in the 3129(f)(1) letter plus the amount of the judgment. 12 *Purd. Stat. App. R. C. P.* 2958(a). The plaintiff must file of record an affidavit that such notices have been sent.

(2) In accordance with Philadelphia Court of Common Pleas Rule 3129(f)(2), the plaintiff must notify the

mortgage debtor by personal service or certified mail at least ten days before the date of the Sheriff's Sale of the place, date and hour of the sale. Rule 2958 provides that no sale may be held unless the debtor has been given at least twenty days' notice by ordinary mail of the Sheriff's Sale. 12 Purd. Stat. App. R. C. P. 2958. An affidavit that such notice has been sent must also be filed of record.

(3) Pennsylvania rules require that notice of the Sheriff's Sale must be given by the Sheriff by handbill posted in the Sheriff's Office and by posting of the property to be sold at least ten days prior to the sale. The notice must describe the property to be sold, its location, the improvements, if any, and must identify the judgment of the court giving rise to the sale, the name of the owner and the time and place of sale. 12 Purd. Stat. App. R. C. P. 3129(a).

(4) Notice containing the facts outlined in paragraph 3 must be given by publication by the Sheriff once a week for three successive weeks in a newspaper of general circulation and in the legal newspaper in the county where the real estate is located. The first advertisement must be at least twenty-one days before the date of the sale. 12 Purd. Stat. App. R. C. P. 3129(b).

The rules outlined above with respect to notice are reasonably calculated, under all the circumstances, to apprise all interested parties (debtors as well as record owners of the mortgaged property) of the pendency of an action and to afford them an opportunity to present their defenses prior to the Sheriff's Sale. This, of course, constitutes compliance with the requirements set forth in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U. S. 306 (1950) and *Schroeder v. New York*, 371 U. S. 208 (1962);

see also *Milliken v. Meyer*, 311 U. S. 457 (1940); *Grannis v. Ordean*, 234 U. S. 385 (1914). Not only is the mortgage debtor served with notice by ordinary as well as certified mail—a procedure approved as constitutional in *Mullane v. Central Hanover Bank & Trust Co.*, *supra*—but the real estate (which is normally the residence of the mortgage debtor) is also posted with a handbill and the same information is published for three successive weeks in the county's legal newspaper and a newspaper of general circulation.

The facts set forth in these notices convey to all interested parties the relevant information. When provided with such notice, the mortgage debtor can easily determine the course of action he wishes to pursue. Furthermore, the amount of time afforded such debtors between the date of the entry of judgment and the final disposition of the case, which is approximately four or five weeks (and never less than twenty days) is clearly a reasonable and sufficient amount of time to take whatever steps are necessary to protect their property. See *Goodrich v. Ferris*, 214 U. S. 71 (1909).

While it is true that the notice given to the debtor does not advise him of his legal rights, we know of no authority which would require that such advice be given in a civil case in order to satisfy the notice requirements of the Fourteenth Amendment. Of course, the debtor is given complete notice concerning the entry of judgment and the intention of the creditor to sell the real estate secured by the mortgage, and this notice is given within ample time (at least twenty days and usually longer) for the debtor to request a hearing. For this Court to go further and hold such notice to be insufficient on the ground that due process requires that parties to *all* proceedings, civil as well as criminal, have to be given notice of their legal rights would certainly create havoc in our judicial system.

The notice requirements imposed by the Pennsylvania Rules of Civil Procedure are clearly sufficient to inform mortgage debtors of all relevant information before their property may be sold to satisfy the judgment. As a result, the debtor is given a full opportunity to request a hearing. Thus, the requirements of due process are satisfied and there is no violation of the Federal Constitution.

II. The Pennsylvania Confession of Judgment Procedure as Applied to Mortgagors Satisfies the Requirements of Due Process Because the Mortgagor Is Afforded a Fair Opportunity to Be Heard Before He Is Deprived of His Property.

Besides affording to the mortgagor abundant notice of the proceedings being taken against him, the Pennsylvania rules governing the confession of judgment method of foreclosure also give the debtor a fair opportunity to be heard not only as to the mortgagee's compliance with relevant procedural rules but also as to all of the merits of the controversy, including any issues presented which relate to the validity of the underlying debt. The mortgagor has this right to a hearing by virtue of the Pennsylvania common law and the Pennsylvania Rules of Civil Procedure, which give him the right to petition to strike the judgment and to petition to open the judgment. The right to be heard on the petition is an absolute right; the hearing is not granted as a matter of favor or courtesy but is guaranteed to the debtor by the Pennsylvania Rules of Civil Procedure and may not be waived. 12 *Purd. Stat. App. R. C. P.* 209; 7 *Standard Pennsylvania Practice* 138 (1961).

Appellant alleges that confession of judgment places an unfair burden on the debtor because it forces him to file a petition to strike or to open the judgment in order to set forth his defenses. We challenge the soundness of appellants' allegation that confession of judgment places an

unfair burden on the mortgagor. We submit that it is no more difficult or expensive for a mortgagor to file a petition to open judgment than it is to file an answer to a complaint. Contrary to appellants' allegation, the debtor is not required by law to pay the Sheriff's costs when filing a petition to open judgment, and the attorney's fees in each type of case would be approximately the same. *See generally*, Philadelphia Bar Association, Minimum Fee Schedule, March 23, 1971.

Appellants are also in error in asserting that a hearing on a petition to open judgment is more costly for the mortgagor than a hearing on a complaint. Appellants contend that the evidence presented in the hearing to open the judgment is limited to "expensive" depositions; however, this contention is unsupported and untrue. While the judge to whom the application is made acts as a chancellor in equity, he will consider and weigh evidence presented in the form of interrogatories, affidavits, exhibits and witnesses as well as depositions. 12 Purd. Stat. App. R. C. P. 2959(e). Once the mortgagor has succeeded in opening the judgment, the case may then be settled by the parties so as to obviate the need for a subsequent judicial proceeding. Even if subsequent proceedings are necessary, the legal expenses and court costs incurred in opening the judgment will generate savings in the following proceedings because no further pleadings are required in such circumstances—12 Purd. Stat. App. R. C. P. 2960—and because any depositions, interrogatories, affidavits or other evidence collected for the hearing on the petition to open can be used either as evidence in the subsequent proceedings or in lieu of pre-trial discovery.

Furthermore, appellants' contention that the mortgagor has a more difficult burden of proof on the issues presented when he petitions to open the judgment than he has in an ordinary complaint proceeding is unfounded. In

an ordinary complaint proceeding, the creditor makes out a prima facie case upon presentation of the debt instrument and the debtor has the burden of proving all affirmative defenses. *O'Neill v. Metropolitan Life Ins. Co.*, 345 Pa. 232, 239, 26 A. 2d 898 (1942); 12A *Purd. Stat.* § 3-307(1) and (2). Such defenses include (but are not limited to) accord and satisfaction, arbitration and award, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, immunity from suit, impossibility of performance, laches, license, payment, release, res judicata, statute of frauds, statute of limitations and waiver. 12 *Purd. Stat. App. R. C. P.* 1030. The burden of proving these affirmative defenses remains with the debtor in a petition to open the judgment. The only change, in fact, favors the debtor: the burden of proof on the question of whether the signature to the bond or mortgage is genuine rests with the creditor. *Yank v. Eisenberg*, 408 Pa. 36 (1962). Furthermore, to place some of the burden of proof on the mortgagor is not in and of itself unconstitutional; this Court has held that to place the burden of proof upon the party who may eventually be deprived of property as a result of the outcome of a judicial hearing is not inconsistent with the dictates of due process. *United States v. Illinois Central R. Co.*, 291 U. S. 457 (1934).

The standard of proof to be met by the mortgage debtor in order to open a judgment is laid down by the common law of Pennsylvania. It is evident from a reading of the cases that this standard of proof is not burdensome; a petition will be denied only when the weight of the evidence is so against the petitioner that a trial court would have been obliged to reverse a jury verdict in his favor. *Jenkintown National Bank's Appeal*, 124 Pa. 337, 17 A. 2 (1889); *Budd v. Coyer*, 273 Pa. 309, 117 A. 449 (1922); *Harris v. Harris*, 32 D. & Co. Rep. 2d 14, 51 Del. Co. Rep. 10 (1963). Even if the Court finds that the standard of proof required of

the petitioner is unduly burdensome and, therefore, an unconstitutional encumbrance on his right to a fair hearing, it does not follow that confession of judgment is also unconstitutional. In that event, it will be sufficient for the Court to rule that the burden must be lightened. In other words, the thrust of appellants' attack should be against the standard adopted by common law rather than against the statute itself.

Thus, a mortgagor in Pennsylvania has—as a matter of right—a full opportunity to present at a judicial hearing all his defenses with respect to any judgment entered by confession. It should also be kept in mind that during the pendency of these judicial proceedings the mortgagor continues to have the unrestricted beneficial use of the real estate securing the debt.

III. Confession of Judgment as Applied to Mortgagors Satisfies Fundamental Principles of Fairness and, Therefore, Accords Due Process.

What kind of notice and opportunity for a hearing constitutes "due process of law" is a question that can be answered only by weighing and balancing the various interests involved, but the State's determination of which interests are to prevail as manifested by the procedure it has adopted should be upheld unless it violates fundamental principles of fairness. *Joint Anti-Fascist Committee v. McGrath*, 341 U. S. 123, 162 (1951) (Frankfurter, J. concurring); *Cafeteria Workers v. McElroy*, 367 U. S. 886 (1961); *Communications Comm. v. W. J. R.*, 337 U. S. 265, 275 (1949); *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 18 How. 272 (1856). Due process does not require a pre-judgment hearing in all cases, but only that there be a reasonable opportunity to be heard and to present all defenses at some meaningful time and in some

meaningful manner. *American Surety Co. v. Baldwin*, 287 U. S. 156, 168 (1932); *Coffin Bros. v. Bennett*, 277 U. S. 29, 31 (1928); *Philips v. Commissioner*, 283 U. S. 589, 596-97 (1931); *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965).

Coe v. Armour Fertilizer Works, 237 U. S. 413 (1915), relied on by appellants, does not support their position. In contrast to the rights of notice and an opportunity to be heard guaranteed to debtors under Pennsylvania law, no such rights were guaranteed by the Florida statute in *Coe*. That case involved an execution pursuant to a Florida statute upon the personal assets of a stockholder of an insolvent corporation. The stockholder had no right to official notice of the proceedings against him and was given no opportunity at any time to raise all of his procedural and substantive defenses. He was afforded a hearing only on the question of whether he was, in fact, the owner of stock upon which there was an unpaid subscription and on whether the amount of the execution upon his personal assets exceeded the unpaid subscription. Under the Florida statute:

“ . . . [I]f the person against whom the execution is issued is not in fact a holder of stock upon which there is an unpaid subscription, or if the amount of the execution exceeds the unpaid subscription, he may have relief . . . and . . . in the absence of such objection on his part, the execution is enforced, although there may have been only a formal levy, without even such notice to the owner of the property as might be implied from a forcible seizure or an interference with his possession.” 237 U. S. at 422.

This Court held that Florida's procedure was a denial of due process, stating:

“ . . . [B]efore a third party's property may be taken to pay [the] . . . indebtedness upon the ground that he

is a stockholder and indebted to the corporation for an unpaid subscription, he is entitled, upon the most fundamental principles, to a day in court and a hearing upon such questions as whether the judgment is void or voidable for want of jurisdiction or fraud, whether he is a stockholder and indebted, and other defenses personal to himself." 237 U. S. at 423.

Since the only hearing available to the stockholder excluded all evidence except that concerning his status as a stockholder, to render judgment against him amounts to adjudicating matters not within the pleadings and not in fact litigated.

"To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice." 237 U. S. at 426.

In the case at bar, there has been no failure to provide mortgage debtors with notice and an opportunity to be heard. In contrast to the Florida statute, the Pennsylvania Rules of Civil Procedure provide for official notice and for a full hearing at which the mortgagor can raise all his defenses to the underlying debt.

Insofar as property rights are concerned, as long as due process rights are assured to the parties at some meaningful stage of the proceedings, there is no constitutional violation; "The 14th Amendment is not concerned with the form." *Coffin Bros. v. Bennett*, 277 U. S. 29, 31 (1928). For example, in *Eghey v. Mallonee*, 332 U. S. 245 (1947), the Court found that the placing of a savings and loan association in the custody of a conservator prior to a hearing—pursuant to the regulations governing the Federal savings and loan system and in accordance with established

custom—was not unconstitutional. In *Ewing v. Mytinger & Casselberry, Inc.*, 339 U. S. 594 (1950), the Court held that the Administrator enforcing Section 304(a) of the Federal Food, Drug and Cosmetic Act, 21 U. S. C. § 304(a), could find probable cause of misbranding of articles without a hearing. Such a finding of probable cause permitted the removal from the market of the misbranded article and authorized the commencement of private actions for damages based on the finding of misbranding. In spite of the hardship and the deprivation of property involved, Justice Douglas, writing for the majority, concluded that there was no violation of the due process clause of the Fourteenth Amendment, saying:

“It is sufficient, *where only property rights are concerned*, that there is at some stage an opportunity for a hearing and a judicial determination.” 339 U. S. at 599. (Emphasis added.)

On the other hand, in *Sniadach v. Family Finance Corporation*, 395 U. S. 337 (1969), where the Court was confronted with an attack on a Wisconsin statute which authorized pre-judgment garnishment of wages before any judicial determination of the rights of the parties, the procedure was found to violate due process. We agree that such a freezing of wages is fundamentally unfair. But, as this Court observed, wages are a very special type of property and the decision was made with specific reference to wages. The problems and deprivations involved in freezing a man's wages are totally different from those involved in providing an expeditious procedure for the foreclosure of mortgages where the property is already subject to the lien of the mortgage and where there is *no actual taking* of property before the debtor has an opportunity to be heard. While we endorse the decision in *Sniadach*, we say that it

does not apply to this case because of the rationale underlying it.

"The result is that a pre-judgment garnishment of the Wisconsin type may, as a practical matter drive a wage-earning family to the wall . . . [and hence] violates the fundamental principles of due process." 395 U. S. at 341-342.

Pennsylvania does not even permit *post*-judgment garnishment of wages, and for very sound reasons, for the concept of attaching wages in the hands of an employer is indeed an oppressive means of collecting a debt.

In reaching its decision in *Sniadach*, the Court emphasized that the garnishment of wages is a unique procedure and constitutes a significant taking of property, since it imposes a tremendous hardship upon the wage earner living near the subsistence level, to whom even the temporary loss of a few dollars may be catastrophic. Further, the Court was concerned that a worker might lose his job because the employer finds it troublesome to administer the garnishment.

It is significant that in *Balthazar v. Mari*, 301 F. Supp. 103 (N. D. Ill.), *aff'd*, 396 U. S. 114 (1969), the Court rejected a contention based on *Sniadach* that the summary sale of property on a tax lien constituted a deprivation without due process. In pointing out that wages are unique, the Court reiterated the language of the majority opinion in *Sniadach*:

"The Supreme Court's recent garnishment decision, *Sniadach v. Family Finance Corp.*, 395 U. S. 337, 89 S. Ct. 1820, 23 L. Ed. 2d 349, is inapplicable. 'We deal here with wages—a specialized type of property presenting distinct problems in our economic system.' 37 L. W. 4520." (Emphasis added.) 301 F. Supp. at 105, n. 5.

Appellants also rely on *Goldberg v. Kelly*, 397 U. S. 254 (1970) which, following the logic of *Sniadach*, required a hearing before welfare payments could be terminated. But *Goldberg* is essentially the same case as *Sniadach*. In both cases the primary concern of this Court was to protect against the possibility of summarily cutting off income needed to provide basic living conditions. If anything, the decision in *Goldberg* is narrower than the decision in *Sniadach* because—by definition—welfare payments are the sole means of support of the recipient.

The entry of judgment by confession pursuant to authority contained in a bond accompanying a mortgage on real estate simply does not work the kind of hardship or deprivation on any class, rich or poor—especially mortgagors—which caused the Court to strike down pre-judgment garnishment in *Sniadach*. For in Pennsylvania the debtor retains the beneficial use and enjoyment of the real estate upon which the savings and loan association executes until final disposition of the proceedings. Before such final disposition can occur, the debtor is given notice of the proceedings and a fair opportunity (a minimum of twenty days and usually longer) to obtain a hearing on the merits by simply filing a petition to open the judgment.

The State has an interest, not only in conserving financial resources by providing summary remedies, but also in making available adequate remedies to creditors so that credit transactions, upon which the economic welfare of the State depends, are made available on a low-cost basis to the broadest range of consumers. It is notable that Philadelphia has the lowest mortgage interest rate of all major cities in the United States. Attached to the brief filed by The Insured Savings and Loan Associations of Philadelphia and Suburbs in the court below is a copy of a report distributed by the Federal Home Loan Bank Board on January 29, 1970. The last two pages of this report show the interest

rates charged in various cities throughout the country. For December, 1969, Philadelphia's interest rate was 7.06%; this is the lowest rate in the nation. The rates range from Philadelphia's low of 7.06% to a high in Denver of 8.78%. One of the factors which affects the mortgage interest rate in Philadelphia is the long established and relatively simple method of foreclosure, made possible by the ability to confess judgment against a delinquent mortgagor. To abolish this effective means of foreclosure will undoubtedly start to channel mortgage money out of Pennsylvania and this, in turn, will cause the prevailing rate of interest in Pennsylvania to increase.

The Pennsylvania confession of judgment procedure can be accomplished in approximately four weeks. If a petition to open the judgment is filed, it can be adjudicated, in the County of Philadelphia, within a few months. If confessions of judgment are held to be illegal, the alternative procedure will be a complaint in mortgage foreclosure. This complaint must be served on the mortgagor by the Sheriff and, once service has been made, the defendant has twenty days to file an answer. In his answer, the mortgagor can demand a jury trial and, if he does, it will take as long as five years (in the County of Philadelphia) before the matter goes to trial. During all of this time, the savings and loan association can take no action, even if the mortgagor makes no payment whatsoever.

Time is of the essence when a defaulting mortgage borrower is the resident of the property, for he will frequently vacate the property, thereby exposing it to vandalism. When the mortgage borrower abandons the property, the exposure to vandalism and the absence of occupants to maintain the property depresses the market value and this jeopardizes the mortgage lender's security. This also works to the detriment of the debtor, because it increases the probability that the proceeds of the sale will be insuffi-

cient to satisfy the creditor's claim and that the creditor will seek to establish a deficiency judgment.

The mortgagee will be further impeded in collecting from the mortgage debtor if Pennsylvania's confession of judgment procedure is declared unconstitutional because more than one full-dress judicial action may be necessary to collect the full amount of the debt. If the mortgagee has to proceed by complaint in mortgage foreclosure, the judgment he obtains will be an *in rem* judgment; and, consequently, he will have to proceed again in assumpsit to collect any deficiency that may arise if the proceeds of the execution sale do not equal the unpaid balance of the mortgage. In addition, after the *in rem* judgment is obtained and execution is completed and before he may proceed to bring an action in assumpsit, the mortgage creditor must, if he is the purchaser at the execution sale, petition the court to have the fair market value of the premises ascertained. This value, rather than the sale proceeds, determines the amount of the deficiency. If the mortgagee fails to petition the court for this purpose within six months, he forfeits any deficiency he might otherwise have obtained. All interested persons must be served with the petition and they may file answers to the averments of the petition. A hearing must be held not sooner than ten days after the petition is served. 12 *Purd. Stat.* § 2621.1 *et seq.*; *United States v. Shimer*, 367 U. S. 374 (1961); *Pennsylvania Co. for Insurances on Lives and Granting Annuities v. Watt*, 151 F. 2d 697 (5th Cir. 1945).

Another complication which arises if a mortgagee can proceed only by complaint in mortgage foreclosure is a consequence of the Federal Tax Lien Act of 1966, Pub. L. 89-719, 80 Stat. 1125. Unlike a confession of judgment proceeding, where the mortgagee proceeds by complaint and there is a Federal tax lien on the real estate to be sold, the Government must be made a party to the suit. 26 U. S. C. A.

§ 7425 (1967).¹ After judgment has been taken, plaintiff can proceed with execution and sale but the property remains subject to the Government's right of redemption for as long as a year.²

Appellants contend that confession of judgment exists in only a few states and, by limiting their remarks to confession of judgment, they imply that almost all states have abolished summary procedures for the enforcement of creditor's claims. But this is simply not true.

First, confession of judgment exists in substantially the same form as it does in Pennsylvania in a majority of states. In none of the statutes cited below is the debtor given more protection, more notice or opportunity to be heard than the mortgage debtor is given under the Pennsylvania procedure: *Alaska*, Alaska Statutes Sec. 09.30.050 (1962); *California*, West's Ann. C. C. P. § 1132 (1955); *Colorado*, C. R. S. 1963 § 13-16-6 (1963); *Delaware*, 10 Del. C. § 3908 (1953); *Idaho*, Idaho Code § 10-901 (1949); *Illinois*, S. H. A. ch. 110 § 50 (1966); *Iowa*, Iowa Code Annotated 676.1 (1951); *Maine*, 9 M. R. S. A. § 3724 (1964);

1. A substantial problem arises under the Federal Tax Lien Act if plaintiff must utilize the complaint method rather than the confession of judgment method. If a search discloses that a Federal lien has been filed against the mortgagor, and plaintiff is proceeding by confession of judgment, the lien can be discharged simply by giving the United States Government twenty-five days' notice of the sale. 26 U. S. C. A. § 7425(b) and (c) (1967). On the other hand, if plaintiff is proceeding by complaint in mortgage foreclosure, the Government must be named as a party and must be served with a copy of the complaint. The Government then has sixty days in which to file an answer. 28 U. S. C. A. § 2410 (1965), *as amended* (Supp. 1971); 38 Pa. Bar Assn. Quarterly 92, 93-4 (Oct. 1967).

2. If a Federal tax lien is involved, the Government has 120 days after the sale in which to redeem the property, but if another type of lien is involved, the Government has one year in which to redeem. 28 U. S. C. A. § 2410(c) (1965), *as amended* (Supp. 1971). Under the confession of judgment procedure, the Government has only 120 days to redeem regardless of the type of lien it holds. 26 U. S. C. A. § 7425(d) (1967).

Michigan, M. C. L. A. § 600.2906 (1967); *Minnesota*, M. S. A. § 548.22 (1964); *Missouri*, V. A. M. S. § 511.070 (1969); *Nebraska*, R. R. S. 1943 § 25-1309 (1970); *New Jersey*, N. J. S. A. 2A:46-13 (1968); *New York*, C. P. L. R. § 3201, § 3218 (1963); *North Carolina*, General Statutes of North Carolina § 1A-1, Rule 68.1 (1964); *North Dakota*, North Dakota Century Code, Rules of Civil Procedure, Rule 68(e), North Dakota Century Code, 51-13-02 (1960); *Ohio*, Page's Ohio Revised Code Annotated § 2323.12 (1968); *Oklahoma*, 12 Okl. St. Ann. § 689 (1958); *Oregon*, O. R. S. § 26.110 (1969); *South Carolina*, Code of Laws of South Carolina 1962 § 10-1535 (1962); *South Dakota*, S. D. C. L. 1967 Sec. 21-26 (1969); *Utah*, Utah Code Annotated 1953, Rules of Civil Procedure, Rule 58A(e) (1953); *Virginia*, Code of Virginia 1958 § 8-356 (1966); *Washington*, R. C. W. A. 4.60.050 (1962); *West Virginia*, West Virginia Code § 56-4-48 (1966); *Wisconsin*, W. S. A. 270.69 (1966); *Wyoming*, Wyoming Statutes 1957 § 1-309, § 1-312 (1959). If the Pennsylvania procedure is unconstitutional, so must all the other states' confession of judgment procedures be unconstitutional.

Second, other summary procedures for the protection of creditor's interests—which afford no more notice or opportunity to be heard than the Pennsylvania confession of judgment procedure—are quite common. For example, under the Uniform Commercial Code, Sec. 9-503, a secured creditor may take possession of his collateral upon the debtor's default without judicial action provided only that no breach of the peace occurs. If a secured creditor chooses to proceed instead with the aid of the courts, he is entitled to replevy the property. In either case, the debtor is deprived of possession of his property before there has been any opportunity for a judicial determination of his rights under the security agreement. This procedure gives less protection to the debtor than the Pennsylvania confession

of judgment procedure: in the one case he loses his property before being heard and in the other he retains his property and merely suffers an encumbrance before being heard. If Pennsylvania's confession of judgment procedure violates due process, so must many of these other creditor's remedies. We note that several suits have already been brought challenging the constitutionality of replevin actions, e.g., *Epps, et al. v. Cortese, et al.*, Civil No. 70-2592 (E. D. Pa., Mar. 31, 1971).

Similarly, in the case of loans secured by mortgages on real estate, it is common practice in a great number of states to use deeds of trust. Under the deed of trust procedure, the debtor places title to the mortgaged real estate in a trustee who is authorized, upon default, to advertise the real estate for sale, hold an auction sale and transfer title to the successful bidder upon payment of the bid price. The proceeds of the sale are applied—in accordance with the terms of the deed of trust—first on account of the creditor's claim and then to the equitable owner. The deed of trust procedure, with only minor variations from state to state, is used in the following states: Alabama, Alaska, Arkansas, California, District of Columbia, Georgia, Hawaii, Idaho, Maine, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New York, North Carolina, Oklahoma, Oregon, Rhode Island, South Dakota, Tennessee, Texas, Virginia, Washington, West Virginia, Wisconsin, Wyoming.³

3. *Alabama*, Code of Ala. Tit. 47 §§ 164-171 (1960); *Alaska*, Alaska Statutes § 34.20.70 (1962); *Arkansas*, Arkansas Statutes 1947 § 51-1112, § 51-1113 (1962); *California*, West's Ann. C. C. P. § 692 (1955); *District of Columbia*, D. C. C. E. § 45-615 (1966); *Georgia*, Ga. Code Ann. § 37-607, § 37-608 (1935); *Hawaii*, H. R. S. § 667 (1968); *Idaho*, Idaho Code § 45-1502-15 (1949); *Maine*, 14 M. R. S. A. §§ 6201-6204 (1964); *Michigan*, R. J. A. §§ 3201-3280, 1964, No. 102; *Minnesota*, M. S. A. § 580-01 (1964); *Mississippi*, Mississippi Code 1942 Ann. § 888 (1964); *Missouri*, V. A. M. S. § 443.310 (1969); *Montana*, Revised Codes of Montana 1947,

If confession of judgment in Pennsylvania is unconstitutional, the deed of trust procedure is also unconstitutional, for the Pennsylvania procedure is considerably more solicitous of the interests of the debtor than the deed of trust procedure that prevails in at least twenty-nine states. For example, in Pennsylvania, the auction sale is conducted pursuant to the Rules of Civil Procedure under the supervision of the Court of Common Pleas. Obviously, this provides protection to debtors that is not available in the case of a sale made by a private trustee pursuant to the terms of a deed of trust.

Appellants submitted evidence in the lower court to the effect that the Pennsylvania confession of judgment procedure was fundamentally unfair and therefore a violation of due process, but we wish to point out that none of this evidence concerned situations where the debtor had signed a bond and warrant accompanying a mortgage. Whether or not the Pennsylvania confession of judgment procedure is fair depends upon the nature of the document signed and the circumstances surrounding its signing.

"Whether the . . . procedure . . . duly observe[s] the rudiments of fair play,' . . . cannot, therefore, be tested by mere generalities or sentiments abstractly appealing. The precise nature of the interest that has

3 (cont'd)

§ 70-616 (1957); *Nebraska*, R. R. S.-1943 §§ 76-1001 to 76-1018 (1970); *Nevada*, N. R. S. §§ 107.010 to 107.080 (1963); *New Hampshire*, R. S. A. c. 479 §§ 25-27 (1955); *New York*, Real Property Actions and Proceedings Law §§ 1401-1403 (1963); *North Carolina*, General Statutes of North Carolina 45-2A (1964); *Oklahoma*, 46 Okl. St. Ann. § 31-9 (1958); *Oregon*, O. R. S. 86.710 (1969); *Rhode Island*, General Laws of Rhode Island 34.27.1, 34.24.4, 34.11.22 (1957); *South Dakota*, S. D. C. L. 1967 21-48-1 (1969); *Tennessee*, Tennessee Code Annotated §§ 35-501 to 35-511 (1955); *Texas*, Vernon's Ann. Civ. St. Art. 3810 (1964); *Virginia*, Code of Virginia 1950 § 55-59 (1966); *Washington*, R. C. W. A. 61.24.030 (1962); *West Virginia*, West Virginia Code, c. 38, art. 1 § 3.84 (1966); *Wisconsin*, W. S. A. c. 297 (1966); *Wyoming*, Wyoming Statutes 1957, Secs. 34-63, 34-64; Sec. 34-68-70 (1959).

been adversely affected, the manner in which this was done, the reasons for doing it, the available alternatives to the procedure that was followed. . . . , the balance of hurt complained of and good accomplished—these are some of the considerations that must enter into the judicial judgment.” *Joint Anti-Fascist Comm. v. McGrath*, 341 U. S. 123, 163 (1951) (Frankfurter, J., concurring).

Appellants' evidence pertained only to cases of consumer installment loans and consumer installment sales contracts; *not one* of the named appellants in this case is a mortgagor complaining about a savings and loan association. Mortgage transactions were not included in the Caplovitz survey or in the testimony of any witness except for Miss Mims and Mr. Casnoff and the testimony they gave pertaining to mortgages was favorable to our position. Miss Mims testified that when she obtained a purchase money mortgage on her home, she was represented by counsel at the settlement (N. T. 62, May 14, 1970). Mr. Casnoff testified that in all the settlements he attended after his admission to the Bar, the mortgagor was represented by an attorney or real estate broker (N. T. 105-110, May 14, 1970). Whether or not the attorney or real estate broker explained to the mortgagor the meaning of the confession of judgment clause, their knowledge and understanding of its significance is imputable to the mortgagor. The Opinion of the lower court notes the absence of evidence relating to mortgage transactions at page 12, 314 F. Supp. 1091, 1098-1099 (E. D. Pa. 1970).⁴

4. The lower court's awareness of the lack of evidence relating to bond and mortgage transactions is clearly shown by its discussion with counsel on May 14, 1970; see N. T. 24-25, May 14, 1970, where the court referred to the distinction made by Mr. Caplovitz and others between the mortgage transaction and other types of confessed judgments. See also, on the same point, N. T. 6-7, 30-31, June 22, 1970.

We also refer the Court to the Stipulation of Counsel dated January 29, 1970—regarding what certain witnesses would say if called to testify—which contains generalizations that are inaccurate when applied to savings and loan associations: (1) The usual attorney's fee contained in a bond and warrant is 5% rather than the figure of 15% to 20% mentioned in the Stipulation. The higher percentage may appear in the confessions utilized by other creditors, but not in the bond and warrant utilized by savings and loan associations; (2) The statement that the debtors were not aware of or did not understand the confession clause does not apply to mortgagors since they are represented at settlement by an attorney or real estate broker, who has the duty of explaining to the mortgage borrower the terms of the documents he is signing; (3) The statement that the contract was forced upon the debtors, that judgment was entered prior to default, that the first notice was that a Sheriff's Sale had been scheduled and that the debtors have defenses such as forgery, failure of consideration, non-default, delivery of defective goods, breach of warranty, etc., is also inapplicable to bond and mortgage transactions.

First of all, there is no evidence of any high pressure tactics having been used on a mortgagor in an attempt to obtain his signature. In addition, the Federal Truth-in-Lending Act, 15 U. S. C. A. § 1635(a) (Supp. 1971), gives the mortgagor a three day right of rescission after he has signed the documents in any case where an existing loan secured by real estate has been refinanced (e.g., where the terms of the loan have been changed at the borrower's request) or where the loan is made to a borrower who already owns his home but wishes to borrow on the security of it. The Court can readily see that there is ample time not only for the mortgagor's attorney or broker to explain the confession of judgment procedure, but also time for the mortgagor to escape a document "forced upon him."

Secondly, the defenses that could be raised by the signers of installment loans or installment sales contracts (such as breach of warranty, failure of delivery, etc.) are not available where savings and loan associations lend for the purpose of financing the acquisition of real estate. The mortgagee neither sells the property securing the loan nor buys consumers' notes from sellers of property. On the contrary, the mortgagor purchases the property from an unrelated third party. Consequently, the range of possible defenses is substantially circumscribed and their nature vastly simplified. The normal mortgage foreclosure does not arise out of a dispute concerning the quality or performance of the item sold; instead, the creditor forecloses because the mortgage debtor simply has failed to make his payments.⁵

Appellants' argument that Pennsylvania's confession of judgment procedure is fundamentally unfair failed to address itself to the unique circumstances presented when a borrower signs a bond and warrant accompanying a mortgage. No evidence was presented to the court below that would indicate a need to abolish confession of judgment as applied to mortgage debtors. Even assuming *arguendo* that some of appellants' evidence did relate to bond and mortgage transactions, appellants failed to present any evidence of unfairness or overreaching sufficiently persuasive to justify this Court in overturning a determination made by the Pennsylvania Legislature as to how the interests of the mortgage lender, the mortgage borrower and the State are to be accommodated.

Appellants' allegation that, since the decision of the lower court was announced, bonds and warrants accompanying mortgages are being used in ordinary consumer installment financing agreements is *dehors* the record and its

5. Any defenses that the mortgage borrower could raise with respect to his purchase are an independent matter and are not adversely affected by the rights of the mortgage lender. Such defenses can always be asserted against his seller.

validity cannot be tested without a rehearing. We respectfully submit that it should be disregarded. The lower court was correct in determining that a narrower definition of the plaintiff class than is here requested by appellants was warranted, for it is well settled that a rule of constitutional law is not to be formulated "broader than is required by the precise facts to which it is to be applied." *Steamship Co. v. Emigration Commissioners*, 113 U. S. 33, 39 (1885). It is clear that the trial court had legal authority to redefine the class; such authority is expressly granted in Fed. R. C. P. 23(c) and (d). See also *Pelelas v. Caterpillar Tractor Co.*, 113 F. 2d 629, cert. denied, 311 U. S. 700 (1940); *Sam Fox Pub. Co. v. United States*, 366 U. S. 683, 691 (1961); *Hansberry v. Lee*, 311 U. S. 32 (1940). Whether a class action will fairly insure adequate representation of all members of the class, as required by the Federal Rules, is a question of fact for the trial court and its determination should not be disturbed unless clearly erroneous. *Pelelas v. Caterpillar Tractor Co.*, supra; *Weeks v. Bareco Oil Co.*, 125 F. 2d 84, 93-4 (7th Cir. 1941).

If the distinctions between the subclasses created by the lower court are not clear cut, the reason may be that the class sought to be represented by the appellants is simply too broad and heterogeneous and has too great a disparity of interests for a court to recognize this suit as a class action. *Chavis v. Whitcomb*, 305 F. Supp. 1359, 1363 (D. C. Ind. 1969). Courts have held that a class action is not proper where the "... description of the purported class depends upon the state of mind of a particular individual, rendering it difficult, if not impossible, to determine whether any given individual is within or without the alleged class." *Chaffee v. Johnson*, 229 F. Supp. 445, 448 (S. D. Miss.), aff'd, 5th Cir., 352 F. 2d 514, cert. denied, 384 U. S. 956 (1966); accord *Koen v. Long*, 302 F. Supp. 1383, 1388 (E. D. Mo.), aff'd, 428 F. 2d 876 (8th Cir. 1970). Many

of the allegations made by appellants as grounds for relief in the case at bar, such as duress, lack of understanding, overreaching, etc., go to the state of mind of the individuals involved and defy categorization by classes in such a way that the members of the class are "capable of definite identification as being either in or out of it." *Chaffee v. Johnson*, 229 F. Supp. at 448.

Appellants' attempt to broaden the class is particularly unfair because they failed to join as parties to this action mortgagees and other creditors who would be affected by the judgment. Nevertheless, they sought a decree that would prevent mortgagees from using the confession of judgment method of foreclosure. Amicus represents such mortgagees, but this is no substitute for being a party to the case. Not only does such exclusion prevent adequate notice of the course of the proceedings and of the arguments of the parties and of the various amici, but it also prevents such mortgagees from presenting evidence and testimony in support of their position. Consequently, several factual misstatements in the record and in appellants' brief could not be refuted except by unsupported allegations that were clearly *dehors* the record and, therefore, improper. We note that the attorneys for appellants have already filed another action in the Eastern District of Pennsylvania which specifically seeks to have the Pennsylvania practice of confession of judgment declared unconstitutional as applied to debtors who sign bonds and warrants accompanying mortgages and they again proceeded by suing to enjoin the Sheriff and the Prothonotary, who are not interested in the outcome of the suit, leaving it to the real parties in interest to intervene as parties or as amici at the discretion of the court, if and when they obtain notice of such a suit. *Jamerson v. Lennox*, 321 F. Supp. 656 (E. D. Pa., 1970). In *Jamerson* appellants joined a few real parties

in interest as additional defendants only after the court refused to hear the case unless they did so.

IV. Even If the Fourteenth Amendment Guarantees Rights Not Provided By the Confession of Judgment Procedure, Such Rights—Like Other Constitutional Rights—May Be Waived.

In Pennsylvania the creditor is not permitted to confess judgment unless the debtor has authorized him to do so in writing. The authority to confess judgment is contained in the warrant accompanying or made part of the bond that the debtor signs at the time of closing the loan. This Court has held that a debtor may consent to the entry of judgment without prior notice and without a prior hearing, for a person may effectively waive his constitutional rights. In *American Surety Co. v. Baldwin*, 287 U. S. 156, 168 (1932), the Court found that the confession of judgment pursuant to a power of attorney in a supersedeas bond without any prior hearing was effective because:

“ . . . [T]he surety company *consented* to the entry of judgment against it without notice for his failure to pay.” 287 U. S. at 168. (Emphasis added.)

In a more recent case the Court again held that consent will operate to waive the benefit of a constitutional right. *National Equipment Rental Ltd. v. Szukkert*, 375 U. S. 311 (1964). In this case the defendants, who resided in Michigan, signed a contract authorizing plaintiff to serve them in New York. Defendants later contended that service in New York was ~~ineffective~~ under the Fourteenth Amendment, but the Court rejected this argument, saying:

“ . . . [I]t is settled as the courts below recognized, that parties to a contract may agree in advance to submit to the jurisdiction of a given court to permit notice to

be served by the opposing party, or even to waive notice altogether." 375 U. S. at 315-316. (Emphasis added.)

This Court in both cases enforced the waivers in spite of the fact that the Fourteenth Amendment, in the absence of a waiver, would have justified the opposite result. *See also, Pierce v. Somerset R. Co.*, 171 U. S. 641 (1898); *Wall v. Parrot Silver & Copper Co.*, 244 U. S. 407 (1917).

The mortgage debtor in Pennsylvania is invariably represented by an attorney or a real estate broker and he is advised at settlement of the creditor's rights. Attorneys and realtors are quite familiar with the standard forms of bonds and mortgages and, of course, they have no difficulty in explaining the terms to the borrower. All Pennsylvania borrowers sign contracts from time to time that contain confession of judgment clauses. The lawyers in this case have no doubt signed such contracts on numerous occasions.

In the cases discussed above—which were civil proceedings—this Court held that a person may waive rights granted to him by the Fourteenth Amendment. Of course, the same principle applies in criminal proceedings, where even the general public is aware of the fact that persons accused of crimes may waive their rights (e.g., the right to remain silent and the right to have a lawyer) even though these rights are guaranteed by the Federal Constitution. *Johnson v. Zerbst*, 304 U. S. 458 (1938); *Fay v. Noia*, 372 U. S. 391 (1963). In criminal proceedings—where the stakes are much higher—the Federal courts enforce waivers every day.

A person may waive constitutional rights either in writing or by his conduct, in civil proceedings as well as criminal proceedings. *Coe v. Armour Fertilizer Works*, 237 U. S. 413 (1915), mistakenly relied on by appellants, clearly supports our position:

"... [T]he court in effect rendered judgment against him upon a matter that was not within the pleadings and was not in fact litigated. *To do this without his consent—and the record shows no consent—is contrary to fundamental principles of justice.*" 237 U. S. at 426. (Emphasis added.)

Even if the Fourteenth Amendment guarantees rights not provided under Pennsylvania law, these rights—like other constitutional rights—may be waived. But we submit that the confession of judgment procedure does not violate the Fourteenth Amendment—with or without a waiver.

CONCLUSION.

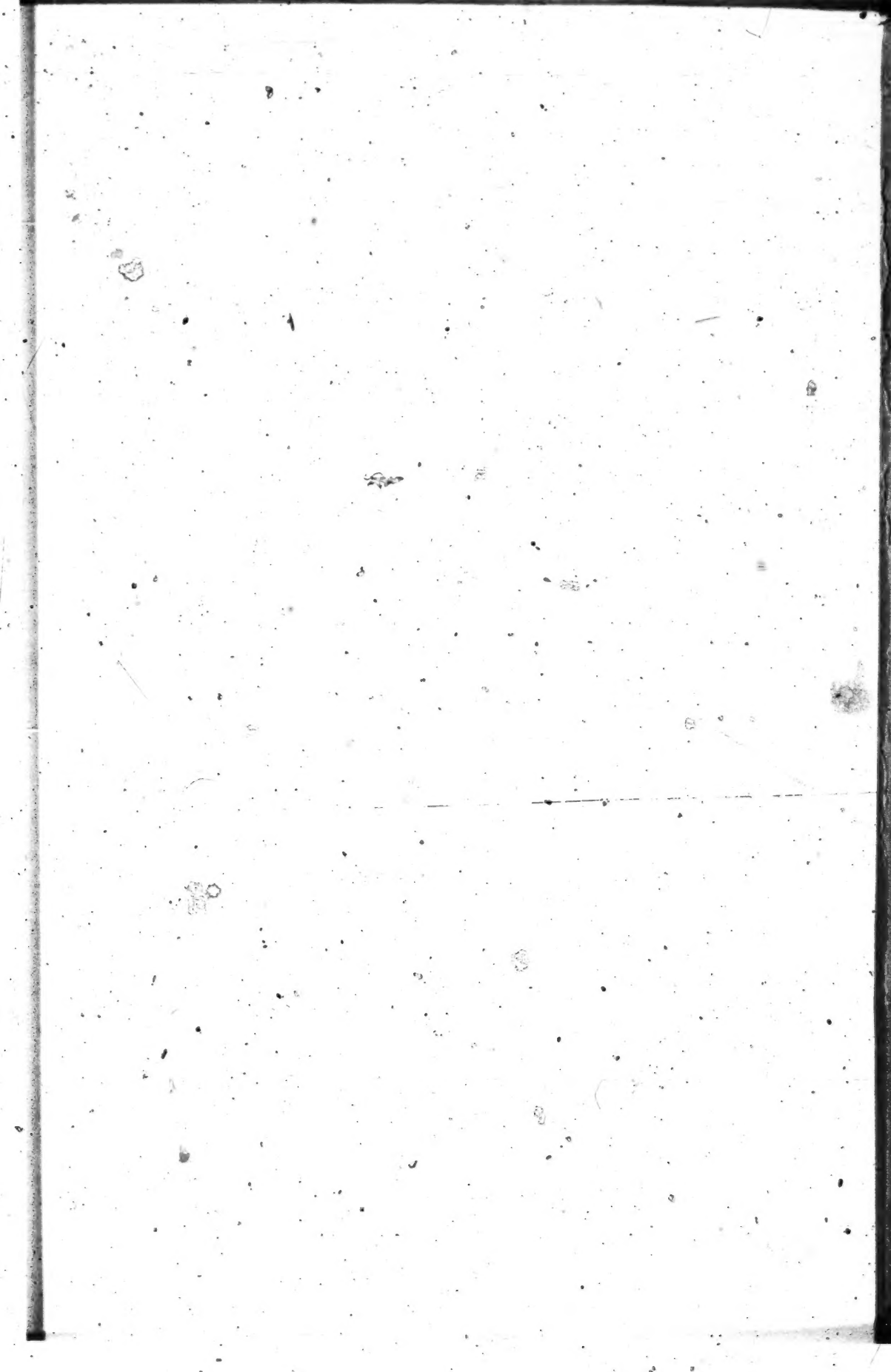
For the reasons stated above, we respectfully request that the Court affirm the judgment of the lower court.

Respectfully submitted,

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Savings and Loan League.*



Supreme Court of the United States

October Term, 1978

No. 538—

NELLIE SWANN, et al.,

Appellants,

WILLIAM M. LENNON, et al.,

Appellees.

**On Appeal From the United States District Court for the
Eastern District of Pennsylvania.**

**BRIEF OF THE INTERVENOR DEFENDANTS,
MIDDLE ATLANTIC FINANCE ASSOCIATION
AND ITS MEMBERS.**

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STATEMENT OF QUESTIONS PRESENTED.

1. Does the existing Pennsylvania confession of judgment procedure impose such a substantially different burden upon the debtor, than would be the case if suit were instituted by service of summons and complaint without prior entry of judgment, as to deny due process?

2. Would the alleged constitutional infirmity, if any, be cured if confession of judgment were *preceded* by a judicial finding, after hearing upon notice, that the judgment debtor knowingly, understandingly and intelligently consented to the creditor's right to confess judgment when he signed the debt instrument containing the confession of judgment clause?

3. Would entry of judgment pursuant to a confession of judgment clause in a promissory note be consistent with due process if proceedings to execute on the judgment were *prohibited until after* liability was established at a *de novo* judicial hearing on the merits, upon notice?

4. Since the plaintiffs' proof of lack of knowing and understanding consent of borrowers in signing documents containing confession of judgment clauses was limited to consumers whose incomes were \$10,000 or less, and to consumer financing transactions not involving mortgages, did not the District Court correctly exclude borrowers with incomes in excess of \$10,000 and mortgage loan borrowers from the class of borrowers benefited by the injunctive decree?

STATEMENT OF THE CASE.

In this Action, instituted against the Sheriff and Prothonotary of Philadelphia County, Pennsylvania, plaintiffs, who are the obligors on notes given by them for consumer financing purposes to sellers or lenders, sought a decree invalidating confession of judgment clauses contained in the notes, on the ground that they had not knowingly and understandingly consented to the confession of judgment procedure. Plaintiffs sued on behalf of all other Pennsylvania residents who had signed notes or contracts containing confession of judgment clauses.

The evidence pertained almost entirely to consumer debtors with incomes of \$10,000 or less. Also, hardly any of it pertained to mortgage debtors. Accordingly, the Court excluded mortgage debtors and debtors with incomes in excess of \$10,000 from the scope of the decree. As to the debtors not thus excluded, viz., non-mortgage debtors who are consumers and have incomes of \$10,000 or less, the Court found that a majority of them do not know or understand the confession of judgment clauses when they sign the loan instruments.

The Court next found that the existing Pennsylvania judgment procedure imposes significant burdens on the judgment debtor with respect to burden of proof, litigation expense and hazard of default, which are not imposed on judgment debtors who are sued by service of complaint and summons without entry of judgment. For this reason, the District Court held that the existing Pennsylvania confession of judgment procedure violates the due process clause of the Fourteenth Amendment as to all judgment debtors who did not make a knowing, understanding and intelligent waiver of their constitutional rights when they signed the debt instruments. The District Court did, however, insert a proviso in its Final Judgment, permitting confession of

judgment when preceded by a judicial determination that the judgment debtor knowingly, intelligently and understandingly waived his constitutional rights when he signed the debt instrument.

Originally, plaintiffs appealed merely from the exclusion of mortgage borrowers and consumer debtors with incomes in excess of \$10,000 from the class benefited by the decree and did not appeal from the exclusion of loan transactions when the debtor knew and understood that the debt instrument authorized confession of judgment. Subsequently, however, plaintiffs expanded the scope of their appeal so as to appeal from this latter exclusion. The intervening defendants consented to this expansion of the scope of the appeal, since it is desirable that the issues at stake be resolved as fully as possible.

The intrevening defendants did not appeal from the decision below. The undersigned counsel were nevertheless requested by this Court to file a Brief on the intervening defendants' behalf. Hence both our prior Brief, in support of our Motion to Dismiss, and this Brief.

Although this Brief will demonstrate that the District Court erred in concluding that the existing Pennsylvania procedures pertaining to confession of judgment are unconstitutional absent knowing and understanding consent by the debtor to the authorization to confess judgment, the principal function of this Brief will be to demonstrate how the District Court's objections to the existing confession of judgment procedure can be obviated. Specifically, it is hereinafter demonstrated that, if the Pennsylvania confession of judgment procedure is changed so as to put the debtor in as favorable a position with respect to burden of proof, litigation expense, and hazard of execution sale by default, as he would have been had he been sued without confession of judgment, due process would not be violated

either by the mere entry of a confession of judgment or by a lien resulting therefrom, even if the debtor is not shown to have known and understood that the debt instrument authorized confession of judgment and that a lien on the debtor's realty would result. Lastly, we demonstrate hereinafter that, even if the Court disagrees with the latter conclusion, any due process objections would be removed by proof that the debtor did know and understand both that the debt instrument authorized confession of judgment and that a lien on the debtor's realty would result. In connection with the latter conclusion, we have described various procedural methods for establishing that the debtor knew and understood that confession was authorized and that a lien on realty would result.

When thus purged of the features which the District Court deemed undesirable, viz., the alleged increases in the burden of proof, litigation expense and hazard of default, confession of judgment is not only innocuous from a constitutional standpoint, but is positively desirable from a public interest standpoint. The reason for this is that it enables a lending institution to make a small or moderately-sized loan on a secured basis at much *less* administrative cost (which is imposed upon and paid for by the borrower) than would be incurred had the borrower been required to sign a mortgage. This cost saving inures to the benefit of borrowers, since many borrowers are thereby enabled to secure credit which they could not otherwise secure. Moreover, the lending institution is enabled to and does pass on its cost savings to the borrower, and the borrower is saved the settlement expense which would be incurred were a mortgage given by him. For these economic reasons, a judgment note has been termed "a poor man's mortgage". For all of these reasons, it is *desirable* that the function of a judgment note as a *lien instrument* be preserved, with proper safeguards *before* execution may be authorized.

SUMMARY OF THE ARGUMENT.

The maker of a promissory note has the burden of proof as to every issue that arises with appreciable frequency even when he is sued without confession of judgment. Accordingly, confession of judgment does not substantially increase his burden of proof. Moreover, since the petition to open would serve the function of an answer, since the depositions taken in connection therewith would obviate the need for discovery, and since the hearing on the petition to reopen would take the place of and would render unnecessary a petition for summary judgment and hearing thereon, the overall expense of successfully moving to open a confessed judgment and of then litigating on the merits would not be greater than the expense of defending an action instituted without confession of judgment. Lastly, since a default judgment can be entered twenty-one days after service of a summons and complaint without confession of judgment, and since execution can immediately ensue, the twenty days notice required prior to the scheduling of an execution sale under a confessed judgment (plus the additional advertising that must precede the actual sale) is no more unfavorable to the debtor.

Confession of judgment can also be validated by a business procedure for fully apprising debtors, when they sign judgment notes, that judgment can be confessed thereon.

Lastly, confession of judgment and any resulting lien on real estate would clearly be validated were execution thereon *prohibited* until after the debtor was served and a judicial determination of liability on a complaint was secured, following a hearing at which the burden of proof and expense would be the same as if judgment had not been entered.

*Argument***ARGUMENT.****Point I.**

The Existing Pennsylvania Confession of Judgment Procedure Does Not Impose Such a Substantially Different Burden Upon the Debtor, Than Would Be the Case if the Suit Were Instituted by Service of Summons and Complaint Without Prior Entry of Judgment, as to Deny Due Process.¹

In the discussion with respect to Point III in our Brief in support of our Motion to Dismiss these appeals, it is demonstrated that, in a suit on a promissory note instituted without confession of judgment, the burden of proof (as well as the burden of going forward with the evidence) is on the defendant with respect to every defense other than the defense of forgery and the defense that the loan was not in fact made. Furthermore, even with respect to the latter two defenses, the burden of going forward with the evidence is on the defendant. Since the latter two defenses are virtually never raised, appellants' argument that the burden of proof is significantly different in connection with a motion to open a confessed judgment is obviously not well founded.

As to the expense factor, the expense of proceeding in connection with a petition to open is completely offset by the fact that these proceedings produce equivalent cost savings in connection with the hearing on the merits which ensues if the judgment is opened. These cost savings are

1. These points are fully discussed on pages 17 through 23 of our Brief in support of our Motion to Dismiss Appellants' appeals, heretofore filed by us with this Court, commencing on the third line from the bottom of page 17 and continuing until the end of page 23. We respectfully refer to and incorporate herein by reference the said discussion in our said Brief.

created by the following factors: (a) the petition to open serves the purpose of an answer, and no answer is required; (b) depositions and affidavits taken in connection with the petition to open would, *pro tanto*, reduce or eliminate the need for discovery proceedings in connection with the hearing on the merits; and (c) any argument held with respect to the petition would take the place of a motion for summary judgment or judgment on the pleadings and would render any such motion unnecessary.

As to the argument that the confession of judgment involves an undue hazard that, within the grace periods available, the debtor will not consult an attorney and will inadvertently permit an execution sale to take place, the answer is that there is just as great a hazard in connection with a suit instituted by summons and complaint without confession of judgment. In such a suit, the plaintiff can enter a default judgment twenty-one days after service of the complaint (Pa. R. C. P. 1037(a)). Immediately thereafter, and even on the same day, he can secure a writ of execution from the prothonotary, Pa. R. C. P. 3102, 3103, 3104. Therefore, real and personal property of the defendant may be simultaneously levied upon. Pa. R. C. P. 3107. Following levy, the personalty levied upon may be sold six days after notice of sale has been given by posting handbills at various specified places, Pa. R. C. P. 3128; and the realty levied upon may be sold twenty-one days after the sale is first advertised, provided it is advertised once a week for three successive weeks in specified publications. Pa. R. C. P. 3129.²

Thus, the hazard of inadvertent default, and of a resultant execution sale, are no greater in the case of confession of judgment than they are in the case of a suit instituted without confession of judgment.

2. The requirements in Pa. R. C. P. 3128 and 3129 as to posting and advertising are just as applicable to execution sales under judgments entered by confession as they are to any other kind of judgment.

Since the burden of proof, expense, and hazard of inadvertent default are no greater in the case of a judgment entered by confession than they are in the case of a suit instituted without confession of judgment, this Court's decision in *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932), sustaining a judgment entered by confession when the debtor is given an adequate opportunity to litigate any defense before execution sale takes place, is applicable.³ So, also are the other decisions by this Court, cited on page 17 of our aforesaid prior Brief, in which an *ex parte* judgment, assessment or other adjudication was sustained because the debtor was given an adequate opportunity to litigate any defenses before execution sale took place.⁴

Furthermore, as is made plain both by the foregoing discussion and by the discussion on pages 17 through 23 of our aforesaid prior Brief, even if there is an increase in the burden of proof and/or expense and/or hazard of default, any such increase is not substantial enough to render the Pennsylvania confession of judgment procedure unconstitutional.

That is not to say that a substantial increase in one of these incidents would render the Pennsylvania confession of judgment procedure unconstitutional. On the contrary, this Court's decision in *National Equipment Rental, Ltd. v. Szukhent*, 275 U. S. 314, 84 S. Ct. 411 (1964) demonstrates that even a substantial increase in one or more of these incidents would not cause the Pennsylvania confession of

3. See page 16 of our aforesaid prior Brief.

4. It should be noted that both the facts in the case at bar and the facts in the *American Surety* case present a much stronger case for validity of the judgment or assessment than the Supreme Court decisions cited on page 17 of our prior Brief, since, both in the case at bar and in the *American Surety* case, the judgment note itself gave notice that judgment might be confessed without further notice. Nevertheless, the judgment, assessment or other adjudication involved in the Supreme Court decisions cited on page 17 of our prior Brief was held valid by this Court.

judgment procedure to be unconstitutional. In that case, a contractual waiver by an equipment lessee of the lessee's constitutional right to be served by personal service in the lessee's home state was sustained, even though the lessee had not read the clause and even though the necessity of defending the action in a distant state would impose a much greater increase in expense than any possible increase in expense which might be incurred by a debtor seeking to open a judgment entered by confession.

We also particularly call the Court's attention to the discussion on pages 21-22 of our said prior Brief, of the holding in *Chester Valley Refrigeration Co. v. Altieri*, 41 Pa. D. & C. 2d (D. P. Monroe Co. 1965), in which the Court specifically held that, since "it is supine negligence not to read the paper before signing it", a judgment entered by confession is not invalidated by the mere fact that the borrower had negligently failed to read the confession of judgment clause.

Point II.

The Alleged Constitutional Infirmary in the Pennsylvania Confession of Judgment Procedure Would Be Cured by Proof Establishing That the Debtor Knew of and Understood the Significance of the Confession of Judgment Clause When He Signed the Debt Instrument.

The District Court's Final Order, Permanent Injunction and Revising Temporary Restraining Order (hereinafter referred to as the District Court's Final Order) was entered on June 16, 1970.

In paragraph B thereof, effective November 1, 1970, the District Court permanently enjoined the defendants and intervening defendants from entering any judgments against members of the class of consumers described in paragraph A.

"... unless it has been shown that the signers of such clauses have intentionally, understandingly, and voluntarily waived all the rights lost under Pennsylvania law, as described in the opinion of June 1, 1970, as amended, when executing a document containing such a clause." 5

In *Brookhart v. Janvis*, 384 U. S. 1, 4 (1966), this Court recognized that constitutional rights can be waived, saying:

"There is a presumption against the waiver of constitutional rights, see, e.g., *Glasser v. United States*, 315 U. S. 60, 70-71, and for a waiver to be effective it must be clearly established that there was an 'intentional relinquishment or abandonment of a known right or privilege.' *Johnson v. Zerbst*, 304 U. S. 458, 464.

In deciding the federal question of waiver raised here we must, of course, look to the facts which allegedly support the waiver."

The District Court, in its opinion, quoted the foregoing excerpt from *Brookhart v. Janvis*, *supra* and then found that, as to most members of the class benefited by the decree, viz., non-mortgage borrowers who are consumers and have family incomes of \$10,000 or less a year, there has heretofore been no waiver, since the Court found that most of them have not known of the presence of the confession of judgment clause when they have signed the debt instruments. See Opinion below, at pages 16-18. Thereafter, the District Court recognized that knowing and understanding consent by a borrower to a confession of judgment clause in the debt

5. The effective date was stated to be November 1, 1970, or "the expiration of the next session of the Pennsylvania General Assembly if the 1970 session has permanently adjourned by the date." Since the Pennsylvania Legislature did not adjourn until after November 1, 1970, the effective date was November 1, 1970.

instrument signed by him would validate the confession of judgment procedure. First, the Court said, at page 18:

"It is not our function to dictate to a state exactly what constitutes understanding waiver of notice in each particular case and what proof of notice would comply with the above-mentioned decisions. Where the debtor is an attorney, all that may be necessary to prove that he understood the meaning and consequences of such a clause in a consumer financing note is an affidavit of such a debtor's profession. On the other hand, more proof may be required of non-high school graduates since the phraseology of the clause in the notes offered in evidence is most difficult for laymen to understand."

Then, in footnote 24 on page 18 of its Opinion, the District Court pointed out that the federal statutory requirement of proof of non-military service of those against whom judgments are entered had been met in some Pennsylvania Counties by rules similar to Philadelphia Court of Common Pleas Rule 921, which provides for the filing of an affidavit of non-military service and, if the debtor's status is unknown, for the appointment of counsel to make an independent investigation and report to the Court. The District Court then said, in the same footnote in its Opinion:

"A similar statewide rule or legislation, providing for the filing of proof of intentional understanding and voluntary consent to confessed judgments in order to comply with this opinion is among the methods available to permit use of the confession of judgment clause if Pennsylvania decides to continue this system."

Similarly, in *Osmond v. Spence*, D. Del., Civil Action No. 3940, Final Opinion May 13, 1971, also decided by a three-judge court, the Court unanimously recognized that a confession of judgment clause can be validated by a know-

ing and intelligent waiver, saying (Opinion, footnote on page 19):

"... nor is it for us to say what amount of evidence it will take to overcome the presumption against waiver. This is a matter for judicial determination in each case. We can only point out that, assuming *arguendo* that less evidence might be necessary to find a waiver of a civil, rather than criminal, right, nevertheless, even in the civil field, the federal courts have insisted that such evidence be of a kind and degree to establish clearly and beyond doubt that the waiver was knowingly and intelligently made".

Thus, confession of judgment pursuant to a confession clause is clearly valid when the debtor knowingly and intelligently consented to it when he signed the debt instrument.

In Section D of their Brief, plaintiffs have made the wholly unsupported contentions: (a) that borrowers in Pennsylvania are unable to obtain loans without being required to sign loan instruments containing confession of judgment clauses; and (b) that, assuming that proposition "(a)" is factually correct, even a knowing and understanding consent to a confession of judgment clause and to a resulting lien on realty should be thereby invalidated. It should first be noted that there is absolutely no record support for proposition "(a)". Certainly, proof that the forms of promissory notes used in loan transactions usually contain a confession of judgment clause does not constitute proof that the lenders are not willing to omit or delete the confession of judgment clause when requested to do so. Our information is to the effect that lending institutions often delete such clauses when requested to do so. Furthermore, there is absolutely no evidence in the record of a

single instance when a lending institution has been requested to omit or delete a confession of judgment clause from the loan instrument.

Moreover, since one of the plaintiffs' witnesses, A. E. Casnoff, testified that his finance company employer "had dropped judgment notes out of a considerable part of its sales finance transactions" and "is prepared to drop judgment notes completely out of its consumer discount transactions" (N. T. 116), the record affirmatively establishes that loans evidenced by loan instruments which do not contain a confession of judgment clause are obtainable.

Accordingly, the factual premise for the "contract of adhesion" argument has not been established.⁶

Point III.

Entry of Judgment Pursuant to a Confession of Judgment Clause in a Promissory Note Would Be Consistent With Due Process If Proceedings to Execute on the Note Were Prohibited Until Liability Was Established at a De Novo Hearing.

A. The Requirement of a De Novo Hearing Prior to Execution Would Obviate Any Possible Constitutional Objection Since the Burden Imposed Upon the Debtor Would Be No Greater Than If Judgment Had Not Been Confessed.

The procedural changes outlined in the heading to this Section would completely take the sting out of confession of judgment, even if the debtor did not know that

6. In addition, plaintiffs have failed to cite a single case to the effect that a particular type of contract provision should automatically be deemed non-enforceable if it is established that the concerns benefited by the provision in question are generally unwilling to delete or omit the clause. This is not the law and never has been the law. A contention identical to plaintiff's "contract of adhesion" contention was rejected, *sub silentio*, by the majority Opinion of this Court in *National Equipment Rental, Ltd. v. Szukhent, supra*, 375 U. S. 314, 84 S. Ct. 411 (1964). See Justice Black's dissenting opinion in that case, in which he stated that "it is hardly likely that these Michigan farmers were in a position to dicker over what terms went into the contract they signed."

the debt instrument authorized confession of judgment when he signed the debt instrument, since the confession of judgment procedure would then be a mere method of commencing a litigation and since no greater burden of proof, litigation expense or hazard of default would be imposed on the debtor than if he had been sued without confession of judgment.⁷

In this connection, it should be first noted that, in *American Surety Co. v. Baldwin*, *supra*, 287 U. S. 156, 53 S. Ct. 98 (1932), this Court sustained a judgment against a surety entered without notice pursuant to a confession of judgment clause in a supersedeas bond, on the grounds: (a) that the surety's act in signing the supersedeas bond constituted "consent" to the confession of judgment clause; and (b) that the entry of judgment was followed by adequate opportunity for a hearing as to its correctness. The Court did not concern itself with, and made no finding with respect to, the question whether the surety had read the bond and learned of and understood the significance of the confession of judgment clause. The court said (at page 168):

"The practice prescribed was constitutional. Due process requires that there be opportunity to present

7. Under the proposed procedure, a complaint or statement of claim would be served upon the debtor at the time when judgment was confessed. A framework for this method of confessing judgment is already provided for by Pennsylvania Rules of Civil Procedure 2951(b), 2952, 2955, 2956 and 2962, which provide for an alternative procedure under which a complaint and confession of judgment would be filed thereon. The rules could be amended so as to provide that the usual rules applicable to actions instituted without confession of judgment would apply except that: (a) the confessed judgment would constitute a lien upon realty dating from the time when it was entered; (b) any judgment obtained on the complaint would be automatically merged in the confessed judgment, or vice versa; and (c) any lien obtained when the judgment was confessed would survive the said merger of judgments.

every available defense; but it need not be before the entry of judgment . . . An appeal on the record which included the bond afforded an adequate opportunity. Thus the entry of judgment was consistent with due process of law."

Similar holdings, sustaining judgments entered by confession, include: *Turner v. Alton Banking & Trust Co.*, 181 F. 2d 899, 905 (8 Cir. 1950); *Bower v. Casanave*, 44 F. Supp. 503, 507 (S. D. N. Y. 1941) and *Levin v. Wendt*, 7 N. J. Misc. 664, 146 Atl. 789 (1929).

Other cases, in which judgments entered without notice were sustained when there was notice and opportunity to present a defense prior to execution, include: *Coffin Bros. & Co. v. Bennett, Superintendent of Banks for State of Georgia*, 277 U. S. 29, 48 S. Ct. 422 (1928) (assessment against stockholders of insolvent bank); *Phillips v. Commissioner of Internal Revenue*, 283 U. S. 589, 596-7, 51 S. Ct. 608 (1951) (income tax assessment); *Jordan v. American Eagle Fire Ins. Co.*, 169 F. 2d 281 (App. D. C. 1948) (administrative order fixing insurance rates). Cf. *Bianchi v. Morales*, 262 U. S. 170, 43 S. Ct. 526 (1923) (summary mortgage foreclosure proceeding, in which payment was the only defense permitted to be asserted, held constitutional, since a separate suit could be brought to annul the mortgage by reason of any other defense).

B. The Requirement of a De Novo Hearing Prior to Execution Would Validate Confession of Judgment Even If a Lien on Realty Was Created When Judgment Was Confessed.

Furthermore it is equally clear that, under the revised procedure outlined hereinabove, the judgment entered by confession would not be rendered unconstitutional by the mere fact that it created a lien upon the debtor's realty.

Coffin Brothers & Co. v. Bennett, Superintendent of Banks for State of Georgia, 277 U. S. 29, 48 S. Ct. 422 (1928), is squarely in point. In that case, both an assessment levied by the Superintendent of Banks without notice against stockholders of an insolvent bank, and a lien which immediately resulted from the assessment, were held not to constitute a denial of due process, since, following the assessment, the stockholders were given notice that the assessment had been levied and, following issuance of execution, they were given the right to file an affidavit of non-liability and to contest liability in a court trial. According to the United States Supreme Court's Opinion in this case (277 U. S. at page 31):

"The objection urged by the plaintiffs in error seems to be that this section purports to authorize an execution and the creation of a lien at the beginning, before and without any judicial proceeding. But the stockholders are allowed to raise and try every possible defense by an affidavit of illegality, which, as said by the Supreme Court of Georgia, makes the so-called execution 'a mode only of commencing against them suits to enforce their statutory liability to depositors.' A reasonable opportunity to be heard and to present the defense is given and if a defense is presented the execution is the result of a trial in court. The Fourteenth Amendment is not concerned with the form. *Missouri ex rel. Hurwitz v. North*, 271 U. S. 40, 46 S. Ct. 384, 70 L. Ed. 818.

As to the lien, nothing is more common than to allow parties alleging themselves to be creditors to establish in advance by attachment a lien dependent for its effect upon the result of the suit. We see nothing in this case that requires further argument to show that the decision below was right" [emphasis added]

There is nothing unusual about the acquisition of a judicial or statutory lien prior to judgment or hearing. Other examples include mechanics' liens, materialmen's liens, attorneys' liens, fraudulent debtor's attachments, warehousemen's liens, bankers' liens, liens on the stock of stockholders defaulting in payment of their stock subscriptions, liens in foreign attachments, and the like. E.g.: see *Ownbey v. Morgan*, 256 U. S. 94, 41 S. Ct. 433 (1921), in which the Court sustained the practice of obtaining jurisdiction by foreign attachment.

The Supreme Court's decision in *Sniadach v. Family Finance Corp. of Bay View*, 395 U. S. 337 (1969), invalidating pre-judgment wage garnishment, is distinguishable for two reasons: (a) the element of consent supplied by the power of attorney to confess judgment found in a judgment note was wholly lacking; and (b) the Court indicated that garnishment of wages is *sui generis* and is distinguishable from attachment of any other type of property. The Court held that garnishment of wages causes such "tremendous hardship to wage earners with families to support" (such as "a great drain on the family income") that the loss of the use of the wages should itself be deemed to constitute a taking of property which would constitute a denial of due process when not preceded by notice and opportunity for hearing. In so holding, the Court pointed out that (p. 349):

"A procedural rule that may satisfy due process for attachments in general, see *McKay v. McInnes*, 279 U. S. 820, does not necessarily satisfy procedural due process in every case" [emphasis added].

Thus, the Court recognized that pre-judgment attachment of property such as realty, bank accounts, stock certificates, and tangible personalty, and the like, is constitutional, even

if not authorized by any previously executed power of attorney.

A *fortiori*, the creation of a lien on realty *pendente lite*, by confession of judgment under a confession of judgment clause, does not violate due process, even if the debtor did not know that the debt instrument authorized confession of judgment and/or that a judgment confessed thereunder would create a lien on the debtor's realty.

That the element of waiver would be sufficiently supplied by the execution of the note, and that knowledge that the note authorized confession of judgment and that a lien on realty would result therefrom need not be proven, necessarily follows from: (a) the fact that the lien created in the *Coffin* case was held valid even though there had been no prior consent to it; and (b) the fact that the "attachments in general" (i.e., all attachment liens other than wage attachment liens), which the Court in *Sniadach* expressly recognized were not affected by its decision, were not preceded by prior consent.

C. Even if the Requirement of a De Novo Hearing Were Held Not Sufficient Per Se to Validate a Confessed Judgment and a Resulting Lien on Realty, the Confessed Judgment and the Resulting Lien Would Be Validated by Proof That, When He Signed the Debt Instrument, the Debtor Knew and Understood That Confession of Judgment Was Authorized by the Lien Instrument and That a Lien on Realty Would Result.

Even were the Court to reject the proposition set forth in the previous subsection, viz., subsection III(B), to the effect that the de novo hearing procedure would validate not only confession of judgment but also any lien resulting therefrom even if the debtor did not know that confession

of judgment was authorized and that a lien on realty would result, it is clear that any such deficiency would be cured by proof that the debtor did know and understand that confession of judgment was authorized by the instrument and that a lien on realty would result. See section II of this Brief, *supra*.

The most practical and feasible way for a lending institution to establish such a knowing and understanding waiver would be for it to prepare and present to the borrower, at the time of the closing of the loan, a separate form specifically advising the borrower, in prominent type: (a) that the debt instrument authorizes the creditor to enter judgment for the amount due on the debt instrument, without farther notice; and (b) that a lien on any of the debtor's realty will automatically be created by entry of the judgment.

Furthermore, the borrower could be required to read the form in the presence of the lending officer, and to certify, in an affidavit on the form, that he had read and understood the contents of the form. Also, the lending officer could be required to certify that the borrower had read the form in his presence and had represented that he understood it.

The foregoing procedures would, we submit, amply satisfy any requirement as to knowing and understanding waiver.

D. The Provisos Qualifying the Retroactive Effect of the Decree Should in Any Event Be Affirmed.

The permanent injunction issued by the District Court was qualified by two provisos, one of which preserved the lien of judgments previously entered by confession, and the other of which provided that confessions might be entered prior to November 1, 1970, upon documents executed prior to the date of the Final Order and Permanent Injunction.

Also, in paragraph D, the District Court modified its prior temporary restraining order so as to permit execution on judgments entered prior to November 1, 1970, provided the state court first determines that the debtor is liable (and gives leave to execute) at a de novo hearing preceded by notice and conducted in accordance with procedural due process, in which event the confessed judgment is to be deemed retroactively valid as of when entered.

These provisos applied the equitable principle that a decision making an unexpected change in the law, as therefore understood, will be given prospective application only, when retroactive application of it would injure persons who reasonably relied upon the prior rule. *Linkletter v. Walker*, 381 U. S. 618 (1965). See also *Great Northern Railway Co. v. Sunburst Oil & Refining Co.*, 287 U. S. 358, 363 (1932). The preservation of prior liens was particularly appropriate and proper, since many creditors, who have given credit on the assumption that they would obtain liens on realty by confessing judgment, could and otherwise would have required the borrower to execute a mortgage.

For the above reasons, we submit that these provisos should in any event be affirmed.

Point IV.

Since the Plaintiffs' Proof of Lack of Knowing and Understanding Consent of Borrowers in Signing Documents Containing Confession of Judgment Clauses Was Limited to Consumers Whose Incomes Were \$10,000 or Less and Consumer Financing Transactions Not Involving Mortgages, the District Court Correctly Excluded Borrowers With Incomes in Excess of \$10,000 and Mortgage Loan Borrowers From the Class of Borrowers Benefited by the Injunctive Decree.

The bases for the conclusions set forth in the heading for this Section have been fully set forth and discussed and

supported on pages 3-8 and 10-14 of our Brief in support of our Motion to Dismiss these appeals. We respectfully refer to, and incorporate herein by reference, the discussion on those pages of that Brief.

With respect to the mortgage exception, it should be particularly noted that it is based on the propositions that, at a real estate settlement at which a purchase money mortgage is given, the purchaser is invariably represented and counselled by a real estate broker who is thoroughly familiar with all of the documents signed by the debtor, and is very often represented and counselled by an attorney who is thoroughly familiar with all of these documents.

In addition to urging that the mortgage exception be sustained, we urge that the Court specifically rule: (a) that the presence of an attorney at a real estate or loan settlement supplies the element of a knowing, intelligent and understanding waiver, since it may certainly be presumed that the attorney knows of the presence and contents of the confession clause in the note or bond and understands its significance, and since the knowledge of the attorney should be imputed to his client; and (b) that, for the very same reasons, the presence of a real estate broker supplies the element of a knowing, intelligent and understanding waiver.

CONCLUSION.

1. The District Court incorrectly found that the burden of proof, litigation expense and hazard of default of seeking relief from a confessed judgment in Pennsylvania are so substantially increased that such a judgment is unconstitutional unless the debtor knowingly and understandingly consented to the authorization to confess judgment. The said finding was erroneous, since, in fact, neither the burden of proof, nor the litigation expense, nor the hazard of default, is substantially increased. Furthermore, even had one or more of these burdens been substantially increased, confession of judgment would nevertheless have been constitutional, in view of the waiver contained in the confession of judgment clause in the debt instrument executed and delivered by the borrower.

2. On the other hand, the District Court correctly found that confession of judgment in Pennsylvania is constitutional if the debtor knew and understood that the loan instrument authorized confession of judgment.

3. Any constitutional objections to the existing Pennsylvania procedure pertaining to confession of judgment would be completely obviated by a procedure precluding execution sale unless plaintiff serves a complaint and summons and secures a judicial determination of liability after giving plaintiff an opportunity to automatically open the judgment and to litigate on the merits without incurring any change in burden of proof, litigation expense, or hazard of default. This would be so regardless whether the debtor knew that the debt instrument authorized confession of judgment. Furthermore, these two conclusions would be correct regardless whether a lien on realty was created or not. Moreover, even if the creation of a lien was deemed otherwise objectionable, proof that the debtor knew and

understood that the debt instrument authorized confession of judgment and that a lien on realty would automatically result therefrom would cure any such constitutional objection.

4. The District Court correctly excluded mortgage borrowers and consumer borrowers with incomes in excess of \$10,000 from the class benefited by the decree, since there was no appreciable evidence in support of plaintiffs' contentions with respect to the two groups.

Respectfully submitted,

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**In the Supreme Court of the
United States**

October Term, 1970
No. 538

70 - 6

NELLIE SWARB et al.,

Appellants

v.

WILLIAM M. LENNOX et al.,

Appellees

*On Appeal From the United States District Court
for the Eastern District of Pennsylvania.*

**BRIEF OF AMICUS CURIAE
PENNSYLVANIA LAND TITLE
ASSOCIATION**

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INTEREST OF AMICUS CURIAE PENNSYLVANIA. LAND TITLE ASSOCIATION

The Pennsylvania Land Title Association is an association whose membership is made up of corporate members (companies authorized to insure titles to real estate within the Commonwealth of Pennsylvania), firm members (mostly law firms, real estate firms and engineering firms) and individual members (attorneys, realtors, bankers and persons engaged in the business of insuring titles to real estate).

All parties have consented to the filing of this brief and the written consents have been filed with the Clerk of the Supreme Court. Because of the state wide and even nation wide implications of the instant case, the Pennsylvania Land Title Association considered itself to be a representative and concerned *amicus*.

The Pennsylvania Land Title Association has declared in its Code of Ethics " . . . that land is that foundation upon which the very existence of our nation is secured . . . " and that " . . . the policy of our nation, expressed through its laws, is wisely dedicated to promote the free alienation and widespread private ownership of land . . . " . . . and the accurate, expeditious and secure alienation of land and interest therein . . . "

The Pennsylvania Land Title Association's members insure titles to real estate within the Commonwealth of Pennsylvania and are, therefore, vitally concerned with any action, legislative or judicial, which establishes, changes or construes the law affecting real estate.

For approximately 165 years, the practice of passage of title by judicial sale, instituted originally by confession of judgment as contained in a credit document (note, bond,

mortgage and warrant) has been widely used, unquestioned and judicially recognized. The members of the Pennsylvania Land Title Association have relied on this practice and had every legal right to rely on it. The instant case, conceivably, could result in this Court holding such practice invalid.

The concern of the title industry is not only that of one threatened with total destruction in case a decision were rendered with retroactive effect but also that of a highly interested segment of the business community which is dedicated to the stability of our real estate laws, orderly private ownership and alienability of real estate and interests therein. In this regard, the Pennsylvania Land Title Association is representing the interests not only of itself and its members, but also hundreds of thousands of owners of real property, large and small, the title to whose properties could be placed in instant jeopardy by any order of this Court that could be construed as retroactive.

The purpose of this brief is to invite the attention of the Court to the chaos, disruption and hardship which could result from any decision in the instant case that would be other than prospective in effect.

SUMMARY OF THE ARGUMENT

3

The Court will decide in this case the fate of entry of judgment by confession pursuant to authority contained in written documents pursuant to established and recognized practice in Pennsylvania. The Court may decide that the entire practice is valid and constitutional. Conversely the Court may find that the procedure is totally unconstitutional or valid only in certain situations or as to certain parties. It is our position, however, that should the decision of this court in any way limit or extinguish the right to execute against real estate in an action commenced by a confession of judgment, such decision must be prospective in operation.

The procedure by which judgments are confessed has been in existence in Pennsylvania since 1806. Its validity has been accepted and relied on. Great numbers of judgments had been entered by confession each year. Many of these judgments lead to the issuance of writs of execution and subsequently to the passage of title to real estate through a sheriff's sale. During the 165 years in which this practice has prevailed, a large percentage of titles to land in Pennsylvania have passed through this procedure. Any decision declaring confessions of judgment invalid which would become retroactive in effect would place a cloud on the title of any real estate which had in its chain of title an execution and sale commenced by the exercise of this statutory procedure.

This Court has the power to provide whether its decision will be applied retroactively or prospectively. The right of prospective overruling has long been recognized in the state courts, *Bingham v. Miller*, 17 Ohio 445 (1848), *State v. Bell*, 136 N.C. 674, 49 S.E. 163 (1904). This Court has also recognized its discretionary right to endow a ruling with purely

viding and restricting creditors' remedies and debtors' rights.

The aggregate finance charges for various classes of these loans must be sufficient to cover the cost of funds to the lender, the cost of making, administering and collecting loans, and the losses incurred, together with a profit sufficient to induce the lender to undertake and carry on the business. An increase in the cost of lending or in the ratio of losses to loans will either increase the finance charge which must be borne by the consumers who repay the loans, or eliminate from the category of prospective borrowers or purchasers those persons presenting the highest cost of collection or the highest risk of loss. An increase in the finance charge will impose an additional burden on the vast majority of consumers who repay their loans without delay or default. An increase in the qualifications of prospective customers will compel those eliminated from consideration by any class of lenders to go to higher cost lenders, possibly to loan sharks, or to go without the consumer goods or home improvements they would like to buy.³

Achieving and maintaining a fair and acceptable balance between the interests of borrowers and of lenders in this situation is essential, but it is not easy or simple.

The banking industry is concerned over the possibility that the many interrelated factors which must be considered in order to achieve and maintain such

³ See *The Impact of a Consumer Credit Interest Limitation Law, Washington State: Initiative 245*, Graduate School of Business Administration, University of Washington, Seattle, Washington, 1971.

a balance may not be taken into account in this case⁴ and other cases⁵ involving attempts to invalidate significant elements of this balanced consumer financing structure on broad constitutional grounds.

CURRENT LEGISLATION

The banking industry is convinced that a desirable balance between the interests of borrowers and of lenders can be achieved and maintained better through the legislative process than through litigation based on broad constitutional principles, which may not be susceptible of flexible application to particular circumstances, and which, in any event, cannot affirmatively amend statutory provisions, so as to compensate for changes made in related statutes by judicial interpretation or invalidation.

⁴ The evidence in this case indicates this danger. Aside from a stipulation as to what the 47 plaintiffs would testify, if called, and another providing for the admissibility of a study which included information about 245 Philadelphia debtors, the evidence consisted of the testimony of one individual debtor, who explained her own lack of understanding of the effect of a confession of judgment clause even though her lawyer had explained it to her in connection with a title closing, the testimony of a detective in the District Attorney's office, who reported on what debtors had told him about their understanding of such clauses, and the testimony of an officer in a consumer finance company, who reported on the statements he made to borrowers as to the effect of such clauses. Without questioning the sufficiency of this evidence to support the rulings of the District Court in this case, it seems completely inadequate for a sweeping revision of the consumer lending field through decisions based on constitutional considerations, and it seems most unlikely that any legislature would make any substantial change in law on the basis of such meager evidence.

⁵ See, for example, *Fuentes v. Shevin*, U. S. Supreme Court, October Term, 1971, No. 70-5039; *Osmond v. Spence*, U. S. Supreme Court, October Term, 1971, No. 70-291; *Overmyer v. Frick*, U.S. Supreme Court, October Term, 1971, No. 69-5.

The consumer lending business, including mortgage lending, involves a closely interrelated series of rights and obligations which cannot be treated in isolation. Eligibility of borrowers, interest rates, security requirements, collection practices—all constitute a single integrated structure, and any change in one element may make it desirable or essential to make compensating changes in other elements.

This consumer lending structure varies greatly from state to state. Pennsylvania, which permits a confession of judgment procedure, has no garnishment statute. The reverse is true of many states. The Commission on Uniform State Laws, in preparing the Uniform Consumer Credit Code—a comprehensive package program—made a number of correlated changes in state laws—for example, raising interest rates substantially and cutting down creditors' remedies.⁶

A legislature can develop all the facts—legal, economic, sociological and moral—needed to reach a sound balance of the competing pressures and interests.⁷ A legislature can also change statutory benefits and burdens in various elements of the consumer lending structure to accommodate the changes it makes in other elements in the structure. A court cannot amend

⁶ This statement is true for the majority of states. However, the effect of adoption of the Uniform Consumer Credit Code would be somewhat different in almost every state, because of the differences in existing state law. In some states the Uniform Consumer Credit Code's 36% interest rate would result in a reduction from the rates permitted under state law; in most states some of the moderate and restrained creditors' remedies provided by the Uniform Consumer Credit Code would seem harsh compared with that state's provisions on that particular creditors' remedy.

⁷ See footnote 3 above.

usury statutes and change maximum interest rates as the Uniform Consumer Credit Code would do; a court cannot amend the National Bank Act and increase or decrease the proportion of the appraised value of a house that a national bank may lend to the purchaser of the house; a court cannot increase or decrease the amounts small loan companies, credit unions, savings institutions, or commercial banks may lend on a consumer or mortgage loan.

It was because of these considerations that the resolution of the major political issues were vested in the Congress and the state legislatures by the Constitution of the United States and of the constitutions of the several states. And it was because of these considerations that courts, both Federal and state, have generally, and wisely, felt it appropriate to exercise restraint in carrying out their vital function of invalidating legislation on the ground of constitutional inhibitions.

The Congress and state legislatures have felt the need for action in this field, and so have Federal and state courts and administrative agencies.

During 1969 and 1970 hundreds of statutes were enacted by state legislatures affecting creditors' remedies and debtors' rights. Six states have enacted the Uniform Consumer Credit Code.⁸ Many states have also established special committees or commissions to study these issues and to make recommendations to their state legislatures.⁹

⁸ Colorado (1971), Idaho (1971), Indiana (1971), Oklahoma (1969), Utah (1969), Wyoming (1971).

⁹ The courts have also been active. This Court, in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969), and many state courts have given impetus to legislative consideration of these issues.

The principal Federal statute in the field is the Consumer Credit Protection Act (82 Stat. 146, 15 U.S.C. 1601), enacted May 29, 1968, after a series of extensive hearings beginning in 1960. Title I of this act, the Truth in Lending Act, provided for consumer credit cost disclosure; Title II prohibited extortionate credit transactions; Title III contained restrictions on the garnishment of wages and salaries; and, Title IV created a National Commission on Consumer Finance.

In 1970, additional consumer legislation was enacted—the Fair Credit Reporting Act (Title VI, P.L. 91-508) and a prohibition on distribution of unsolicited credit cards and other credit card provisions (Title V, P.L. 91-508).

NATIONAL COMMISSION ON CONSUMER FINANCE

One of the major provisions of the Consumer Credit Protection Act was Title IV, which created the National Commission on Consumer Finance. This Commission consists of three members of the U.S. Senate, three members of the U.S. House of Representatives, and three private citizens appointed by the President. The Commission was directed to "study and appraise the function and structure of the consumer finance industry, as well as credit card transactions generally". The Commission was particularly charged with the duty of studying:

- "(1) The adequacy of existing arrangements to provide consumer credit at reasonable rates.
- "(2) The adequacy of existing supervisory and regulatory mechanisms to protect the public from unfair practices, and insure the informed use of consumer credit.

"(3) The desirability of Federal chartering of consumer finance companies, or other Federal regulatory measures."

The Commission was required to report by January 1, 1971, later extended to July 1, 1972 (P.L. 91-344).

The Commission has undertaken an extensive research program, which was set forth in its release of March 18, 1971, a copy of which is attached as Exhibit A.

As part of its program, the Commission recently prepared and sent to thousands of credit grantors, including over 1,200 commercial banks, questionnaires on "Consumer Credit Collection Practices and Creditors' Remedies". (Extracts from the questionnaire sent to commercial banks are attached as Exhibit B.) The aims of the Commission in making this survey were stated by the Commission's Executive Director, Mr. Robert L. Meade, as follows:

"In view of the Commission's desire to appraise objectively and completely all relevant information, the questionnaire has been designed with three aims. *First*, to enable the Commission to understand thoroughly the normal business practices utilized in collecting debts. *Secondly*, to permit the Commission to establish the extent and frequency of use of certain collection practices. *Third*, to ask your assistance in relating to the Commission the experience of your institution in a state or states whose laws either prohibit or restrict certain contractual terms relating to creditors' remedies and collection practices generally, in order that the Commission may ascertain what actual effects, if any, may be expected in the future if such limitations were adopted more widely."

The information obtained by the National Commission on Consumer Finance, as a result of this survey and other studies it is making, is considered necessary by the Congress as the basis for further legislation in this field.¹⁰ It is submitted that the same information is necessary before broad or radical changes in the consumer and mortgage lending field are made by judicial action.

CONCLUSION.

The American Bankers Association moves for leave to file a brief in this case as *amicus curiae*, in support of the rulings of the District Court indicated above, and in opposition to proposals to extend the scope of the decision in this case beyond the rulings of the District Court.

Respectfully submitted,

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September 30, 1971

¹⁰ Even after the extensive consideration over a period of eight years which was given to the Truth in Lending Act, unresolved questions and difficulties in interpretation of the statute and the Federal Reserve Board regulations issued under it have been the basis for many suits, in the nature of class actions, against banks and others for alleged violations (some purely technical, some of minimal significance) of the Truth in Lending Act or other related statutes, involving claims in amounts up to millions and tens of millions of dollars. These cases make it clear that inadequately considered actions in this field can have serious consequences to banks and to the banking system.

EXHIBIT A

March 18, 1971

**OUTLINE OF RESEARCH PROGRAM
NATIONAL COMMISSION ON CONSUMER FINANCE**

1. The Problem and the Study
2. Structure of the Industry
3. Regulatory Mechanisms
4. Availability
5. Reasonable Rates
6. Disclosure
7. Unfair Practices
8. Effectiveness of Regulatory and Supervisory Mechanisms
9. Information and Education
10. Credit Insurance
11. Federal Chartering
12. The Future of Consumer Credit
13. Summary—Conclusions—Recommendations

* * * * *

**NATIONAL COMMISSION ON CONSUMER FINANCE REPORT
ON CURRENT STUDY PROJECTS**

The National Commission on Consumer Finance was directed by Congress to "study and appraise the functioning and structure of the consumer finance industry, as well as consumer transactions generally" and to report its findings on:

- (1) the adequacy of existing arrangements to provide consumer credit at reasonable rates;
- (2) the adequacy of existing supervisory and regulatory mechanisms to protect the public from unfair

practices and to insure the informed use of consumer credit; and

- (3) the desirability of Federal chartering of consumer finance companies, or other Federal regulatory measures.

To do this adequately, the Commission developed the attached outline based on the statute to serve as a framework for its research.

Since much of the information needed for its studies has been unavailable or in unusable form, the Commission has launched several data collection projects of its own. These and other Commission studies are currently under way.

Traditionally, consumer credit legislation has focused on a specific problem with the idea of correcting a specific abuse. Repeatedly, legislation has been drafted or amended on the basis of these assumptions despite the fact that few if any facts are available on the potential effects of proposals. But this Commission, from the data it gathers, will try to assess the many variables that affect any changes in the "... functioning and structure of the consumer finance industry." Such assessments should provide a basis for legislative bodies, both state and national, to predict with better accuracy the effect on credit grantors and users of proposed laws and regulations to consumer credit. Future legislative and regulatory efforts may thus occur in a context of overall objectives sought and the predictive consequence of particular legislation on these objectives.

The complexity of the consumer finance industry is brought into sharp focus by the Commission's first area of inquiry: "the adequacy of existing arrangements to provide consumer credit at reasonable rates." It has often been pointed out that credit laws are a patchwork of Federal and state legislation, varying from moderate to extensive state-by-state. The variations among state laws

may well be a vital research tool in the Commission's study. Thus, to assess the potential impact of any change in the law on credit grantors and users, the Commission plans to determine the price and amount of credit on a state-by-state basis, including credit generated by banks, retail establishments, credit unions, and finance companies. When these data are gathered, the Commission will attempt to measure the effects of local rate ceilings; state licensing requirements that limit entry of new competition in the consumer finance market; branch banking laws and regulations; and the existence or nonexistence of certain creditor and debtor remedies on the price and amount of credit in each state. To complete this analysis, the Commission will also analyze the statutes and available administrative and case law of each state to determine:

- (1) the rate ceilings for each category of credit (i.e., small loans, retail installments sales, etc.) in each state;
- (2) the existence or nonexistence of convenience and advantage statutes in each state and whether such statutes are, in fact, barriers to creditor entry in the small loan credit market;
- (3) the existence or nonexistence of branch banking provisions and whether these provisions are barriers to entry; and
- (4) which creditor and/or debtor remedies are permitted in each state and how these remedies affect the availability of consumer credit.

To put these data in perspective as well as to fulfill its Congressional mandate, the Commission must also try to determine which segment of the community cannot obtain credit at existing rates and why. After these data have been gathered and analyzed, the Commission can begin to assess the adequacy of available consumer credit at reasonable rates.

The following is a listing, together with a brief description, of Commission research projects now in progress. Neither the descriptions nor the order are indicative of the relative importance of the studies.

The Commission is conducting a study of the pricing process in the consumer credit industry to try to assess the effect of state laws, government regulation, market structure and demographic and other factors on the price and availability of consumer credit. The survey will collect data on a state-by-state basis (probably using the fourth calendar quarter of 1970) for (1) the total amount of consumer installment credit extended and outstanding, and (2) the average price of such credit. This is the first time that any agency—public or private—has collected finance rate data on a national or state basis for each category of consumer installment credit and the first time that extensions and outstandings have been collected on a state-by-state basis.

This project will enable the Commission to analyze differences in the price and availability of consumer installment credit as they relate to differing state laws (i.e., analysis of the effects of rate ceilings, restrictions on entry, etc.). It will also be invaluable as the Commission attempts to appraise "the functioning and structure of the consumer finance industry" and "the adequacy of existing arrangements to provide consumer credit at reasonable rates." This study should give the Commission insight as to the desirability of Federal chartering.

Another area of Commission research concerns creditors' remedies. During the Commission hearing in June 1970, several witnesses representing consumer interests recommended curtailment or abolishment of certain collection practices, creditors' remedies, and contractual provisions. To prepare for a possible

hearing at which credit industry representatives could discuss these proposals, Commission staff designed a comprehensive data-gathering outline to be completed by a sample of credit grantors representing the existing categories of consumer credit. Basically, the outline was prepared to help the Commission understand practices normally used in debt collection; to compile data establishing the extent and frequency of the use of such practices; and to document the experience of various credit grantors in states which have either abolished or restricted certain creditors' remedies, collection practices or contractual provisions.

The Commission expects responses to this outline to help it gauge the possible effect upon the credit granting industry if certain practices or laws were abolished or changed. For example, would abolishing the holder-in-due-course defense make credit less available or more costly? Would it exclude low income consumers from the legitimate credit market? Would it change credit granting criteria and cut off credit to a segment of the population, other than low income consumers, to which it is presently available?

The Commission believes that it is breaking new ground with this study since to its knowledge no analyses have previously been undertaken to determine what occurs when laws restricting debt collection methods have been enacted.

Another offshoot of the June hearings is a study of automobile repossessions in the District of Columbia. This project was designed to determine the number of repossessions, the nature of repossession practices, and the effects of repossession—particularly deficiency judgments. Staff researchers were able to trace records of 106 automobiles through court and Motor Vehicle Department files from first financing

through repossession, wholesale resale (which establishes the deficiency) and the ultimate retail resale. In each case, actual sale price and NADA Guidebook wholesale and retail values were recorded and the results are now being tabulated for study. The Commission hopes that a comparison of these values will indicate whether "commercially reasonable sales" have taken place. These data, plus data derived from FTC studies designed from the Commission's automobile repossession study format and now being completed in several U. S. cities, should provide information indicating if alternative approaches to the repossession-deficiency process should be considered.

The Commission staff is closely analyzing the Federal Reserve Awareness studies of 1969 and 1970 to assess more specifically the effects of the Truth in Lending legislation on the public. A questionnaire was designed and sent for completion to the nine agencies charged with enforcing Title I of the Consumer Credit Protection Act. Results of this questionnaire should assist in further assessment of the effectiveness of Truth in Lending, as well as the effectiveness of the enforcement activities of the nine agencies.

The Commission has contracted for a study in California of awareness, attitudes, and use of credit by all income groups and by a special sample of low income blacks. This study will attempt to relate the consumer's awareness of finance charges and rates to the decision to purchase goods on a cash or credit basis. It will also determine if consumers consider planning, comparison shopping and present credit obligations in making their purchasing decisions. Data obtained from this research will be compared with the Federal Reserve Awareness study of December 1970 and with a similar study completed by a Stanford doctoral student in June 1969.

The California study and Commission staff analysis of the Federal Reserve survey should help the Commission decide whether "existing regulatory and supervisory mechanisms . . . insure the informed use of consumer credit," and whether educational and counseling programs are needed to supplement Truth in Lending.

The Commission has contracted to develop a credit-scoring system for lenders who extend credit to low income borrowers. Currently used systems for screening credit applicants seem to lack the kind of criteria that might provide creditors with information to make better judgments between "good" and "bad" credit risks at the low income level. This project may enable the Commission to assess how much the limitations of present systems restrict credit and to suggest recommendations concerning the design of credit-scoring systems to accommodate more fairly and accurately the low income segments of our population. This study partially answers questions concerning the "adequacy of existing arrangements to provide consumer credit at reasonable rates."

In a related area, the Commission has contracted to analyze the debt position of families in poverty areas. This study is intended to help ascertain whether poverty neighborhood consumers whose income, stability of income, and the liquid assets resemble nonpoverty area residents can get credit as readily in the same amounts as their nonpoverty area counterparts. It will also explore the possibility of variances in the availability of credit as between racial groups in the poverty and nonpoverty areas.

The Commission has initiated a pilot study to determine what happens to applicants rejected for retail credit by large retailers. This study should provide some indication of the extent to which the consumer's

basic need for retail credit was genuine in the sense that his drive for purchase was strong enough to motivate him to search for other sources of credit. The study should also disclose what other sources of credit were approached and the socio-economic characteristics of consumers denied credit by other such retailers.

The Commission is currently attempting to compile and evaluate experimental credit granting programs now in operation in the United States. Sources of credit for these programs include low income credit unions, banks and retail merchants. The Commission is also compiling and evaluating credit counseling and educational programs.

The Commission has queried all state and local bar groups as to their views and activities regarding various debt collection practices. Responses are currently being examined.

Other projects in preliminary stages are:

A study of the cost structure of consumer finance companies and the retail industry.

A study of how low rate ceilings on credit affect the price of retail goods.

A theoretical study of imperfections and competition in consumer credit markets.

A history of rate making and regulation.

FORM L-11

NATIONAL COMMISSION ON CONSUMER FINANCE	OMB NUMBER : 155-571803 EXPIRES : December 31, 1971
SURVEY OF CONSUMER CREDIT COLLECTION PRACTICES AND CREDITORS REMEDIES	DUE DATE : October 1, 1971
	IDENTIFICATION NUMBER :
COMMERCIAL BANKS	

INSTRUCTIONS

Please read all instructions before filling out the enclosed questionnaire.

This questionnaire is designed (1) to provide the Commission with a summary of the normal business practices utilized in collecting consumer debts; (2) to permit the Commission to determine the extent and frequency of use of certain consumer credit collection practices; and (3) to determine the experience of creditors in a state or states whose laws either prohibit or restrict certain contractual terms relating to creditors' remedies and consumer credit collection practices generally.

Consumer credit includes all short and intermediate term cash and sale credit that is extended through regular business channels to finance the purchase of commodities and services for personal consumption, or to refinance debts incurred for such purposes. It includes credit extended to individuals for household, family and other personal expenditures and excludes long term real estate mortgage credit as well as commercial, industrial, and other business loans and loans to farmers for agricultural purposes. Installment credit is defined as all consumer credit that is scheduled to be repaid in two or more payments.

Note that if information requested for any item is not available from your records, your best estimate is acceptable and should be reported. If information is accessible, sampling techniques may be used to complete the questionnaire. If you sample, briefly describe the method utilized.

Parts I, II and III of the questionnaire should be completed and returned in the enclosed postage-paid envelope to the National Commission on Consumer Finance, 1016-16th Street, N.W., Rm. 300, Washington, D. C. 20036, no later than October 1, 1971. Although your bank may not be able to supply all of the items of information sought, the Commission nevertheless requests return of the questionnaire on the above date. Response to this inquiry is required by law under Title IV of the Consumer Credit Protection Act (82 Stat. 165). By the same law, your report is confidential. Please complete the questionnaire to the extent possible for each type of credit which your bank extends.

Part I is designed to provide background information concerning the size and diversity of your bank's consumer credit operation and its geographic scope.

Part II of the questionnaire is designed to provide the Commission with a broad overview of your bank's normal collection activity in the consumer credit department(s). This includes measures of delinquency, default, and frequency of use of various collection practices.

Part III is intended to provide the Commission with data concerning your bank's experience in the use of the various creditors' remedies and contractual provisions available to you.

INSTRUCTIONS (CONTINUED)

Specific instructions accompany each question. Most of the questions deal with collection practices, contract provisions, and/or creditors' remedies as they relate to six basic types of consumer credit. Those six types are:

Automobile - Purchased Paper
Automobile - Direct Loan for Purchase
Sale Credit - Credit Card
Other Consumer Goods - Purchased Paper
Other Consumer Goods - Direct Loan for Purchase
Personal Loan

For these purposes, "Other Consumer Goods" excludes automobiles, mobile homes, boats, aircraft, and recreational vehicles. This category will typically include furniture, appliances, sporting goods, jewelry, silver, automotive accessories, and similar items as well as consumer services such as medical, dental, and hospital bills.

COMMERCIAL BANKS

State in which chartered

Part I - Type of Credit Extended

Please indicate below the number and dollar amount of accounts outstanding at 6/30/71 for each of the types of consumer credit your bank extends. If the information is not available as of 6/30/71, please furnish it as of the most recent date available and indicate that date here. In the third column, for indirect credit please list the state or states (other than the state in which your banks is chartered) in which dealers from whom you purchase contracts are located.

	Number of Accounts With Balances	Dollar Amount Outstanding	States in Which Dealers are Located
1. Automobile Financing			
a. Purchased Paper (Indirect)		\$	
b. Direct Loan for Purchase		\$	
2. Consumer Goods Financing Involving Purchases of Goods other than Automobiles, Mobile Homes, Boats, Aircraft & Recreational Vehicles			
a. Sale Credit - Credit Cards		\$	
b. Purchased Paper (Indirect)		\$	
c. Direct Loan for Purchase		\$	
3. Personal Loans		\$	

COMMERCIAL BANKS PART II - COLLECTION PRACTICE AND PROCEDURES

Express each answer as a percentage of total for type of credit to which it relates, not to total consumer credit. (e.g., if routine delinquency notices were sent to 20 out of 200 obligors on Automobile Purchased Paper, the answer to question 1a in flight column would be 10%)

PLEASE INDICATE:

	AUTOMOBILE FINANCING		CONSUMER GOODS FINANCING		PERSONAL LOANS	
	PURCHASED PAPER (Indirect)	DIRECT LOAN	PURCHASED PAPER (Indirect)		DIRECT LOAN	
			Secured	Unsecured	Secured	Unsecured
1a. Percentage of number of accounts with balances outstanding as of June 30, 1971, which involve routine mailing of delinquency notices to debtor.	\$	\$	\$	\$	\$	\$
1b. Percentage of dollar amount outstanding as of June 30, 1971 or of annual dollar volume of accounts for the year then ended which involve routine mailing of delinquency notices to debtor. Indicate basis used: Dollar amount outstanding _____ Annual dollar volume _____	\$	\$	\$	\$	\$	\$
2a. Percentage of number of accounts with balances outstanding as of June 30, 1971, which involve collection efforts beyond routine delinquency notices mailed to debtor (e.g. turning over an account to your collection department or to an outside collector).	\$	\$	\$	\$	\$	\$
2b. Percentage of dollar amount outstanding as of June 30, 1971, or of annual dollar volume of accounts for the year then ended which involve collection efforts beyond routine delinquency notices mailed to debtor. Indicate basis used: Dollar amount outstanding _____ Annual dollar volume _____	\$	\$	\$	\$	\$	\$
3a. Percentage of number of accounts with balances outstanding as of June 30, 1971, which have been declared to be in default and involved collection efforts beyond routine delinquency notices mailed to debtor.	\$	\$	\$	\$	\$	\$
3b. Percentage of dollar amount outstanding as of June 30, 1971, or of annual dollar volume of accounts for the year then ended which have been declared to be in default and involved collection efforts beyond routine delinquency notices mailed to debtor. Indicate basis used: Dollar amount outstanding _____ Annual dollar volume _____	\$	\$	\$	\$	\$	\$

COMMERCIAL BANKS

4. Listed in the left margin below are nine bases for taking special action beyond routine delinquency notices to collect an account. For the type of consumer credit listed in each column please rank on the basis of your experience, the reasons for taking action in ascending order of frequency of occurrence, i.e. the most frequent are to be ranked "1", and the least frequent are to be ranked "9".

	Consumer Goods Financing Involving Individual Purchases of Goods Other Than Automobiles, Mobile Homes, Boats, Aircraft and Recreational Vehicles						Personal Loans	
	Automobile Financing		Sale Credit-Credit Cards		Direct Loan for Purchase		Purchased Paper (Indirect)	
	Purchased Paper (Indirect) Rank	Direct Loan for Purchase Rank	Sale Credit-Credit Cards Rank	Direct Loan for Purchase Rank	Purchased Paper (Indirect) Rank	Rank	Rank	Rank
a. Failure to keep collateral insured								
b. Removal of Property from State								
c. Delinquent Payments								
1 to 29 days								
30 to 59 days								
60 to 89 days								
over 90 days								
d. Creditor's Insecurity								
e. Skip								
f. Others (e.g. bankruptcy, irresponsibility, etc.)								
Specify _____								

COMMERCIAL BANKS
PART III - CONTRACT PROVISIONS AND CREDITORS' REMEDIES

17a. Where permitted by law, do the majority of the consumer credit contracts which you purchase include the following contract provisions? (check appropriate box)

Type of Credit	State from which you purchase contracts	Waiver of Buyer Defenses		Acceleration Provisions		Wage Assignments		Cross Collateral		Confessions of Judgment		Attorneys Fees		Security Interests or Repossessions		Others**	
		Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Automobile																	
Purchased Paper																	
Other Consumer Goods																	

**Include state in which your bank is chartered

**Specify

COMMERCIAL BANKS

State in which chartered

17b. Where permitted by law, do you include the following contractual provisions in substantially all of your consumer credit contracts and/or notes? (check appropriate box)

Type of Credit	Waiver of Buyer Defenses		Acceleration Provisions		Wage Assignments		Cross Collateral		Confessions of Judgment		Attorneys Fees		Security Interests or Repossessions		Others*	
	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No	Yes	No
Direct Loan - Automobile Purchase	N.A.	N.A.														
Direct Loan - Other Consumer Goods Purchase	N.A.	N.A.														
Sale Credit on Credit Card																
Personal Loan	N.A.	N.A.														

*Specify

COMMERCIAL BANKS

21. With regard to contract clauses that you invoke in formal legal proceedings, indicate by checking the appropriate box whether you find these clauses shown in the column headings to be substantially useful in collection, moderately useful in collection, or unnecessary to collection. Where not permitted by law, insert the letters "n.a."

Type of Credit	Degree of Usefulness	Waiver of Buyer Defenses	Acceleration Provisions	Wage Assignments	Cross Collateral	Confessions of Judgment	Attorneys Fees	Security Interests or Repossessions	Others*
Automobile - Purchased Paper	Substantial								
	Moderate								
	Unnecessary								
Automobile - Direct Loan	Substantial	N.A.							
	Moderate	N.A.							
	Unnecessary	N.A.							
for Purchase Sale Credit - Credit Cards	Substantial								
	Moderate								
	Unnecessary								
Other Consumer Goods-Purchased Paper	Substantial								
	Moderate								
	Unnecessary								
Other Consumer Goods-Direct Loan	Substantial	N.A.							
	Moderate	N.A.							
	Unnecessary	N.A.							
for Purchase Personal Loans	Substantial	N.A.							
	Moderate	N.A.							
	Unnecessary	N.A.							

If you have classified any of the above clauses as "substantially useful," state briefly your reasons.

Specify

COMMERCIAL BANKS

22. If you are not permitted to use one or more of the contract clauses shown in the column headings in ANY of your consumer credit transactions, indicate by checking the appropriate box whether you would consider the availability of such clause(s) to be substantially useful in collection, moderately useful in collection, or unnecessary to collection. Where permitted by law, insert the letters "N.A."

Type of Credit	Degree of Usefulness	Waiver of Buyer Defenses	Acceleration Provisions	Wage Assignments	Gross Collateral	Confessions of Judgment	Attorneys' Fees	Security Interests or Repossessions	Others*
Automobile-Purchased Paper	Substantial								
	Moderate								
	Unnecessary								
Automobile-Direct Loan for Purchase	Substantial	N.A.							
	Moderate	N.A.							
	Unnecessary	N.A.							
Sales Credit-Credit Cards	Substantial								
	Moderate								
	Unnecessary								
Other Consumer Goods-Purchased Paper	Substantial								
	Moderate								
	Unnecessary								
Other Consumer Goods-Direct Loan for Purchase	Substantial	N.A.							
	Moderate	N.A.							
	Unnecessary	N.A.							
Personal Loans	Substantial	N.A.							
	Moderate	N.A.							
	Unnecessary	N.A.							

If you have classified any of the above clauses as "substantially useful," state briefly your reasons.

Specify

COMMERCIAL BANKS

27. For each of the four categories of consumer credit transactions listed in the column headings below, if your bank had to rely primarily on one of the contract provisions or creditor remedies listed, indicate (by checking the appropriate box) which one you feel is most essential to your collection activity. (Check only one in each column.)

	Direct Loan Secured	Direct Loan Unsecured	Purchased Paper Secured	Purchased Paper Unsecured
Contract Provisions:				
Waiver of Buyer Defenses	N.A.	N.A.		
Acceleration Provision				
Wage Assignment				
Cross Collateral		N.A.		N.A.
Confession of Judgment				
Attorney's Fees				
Security Interest (Repossession)		N.A.		N.A.
Creditor Remedies:				
Deficiency Judgment		N.A.		N.A.
Garnishment				
Holder in Due Course Defenses	N.A.	N.A.		
Levy on Personal Property				
Set-off				
Body Attachment				

State briefly your reasons for each choice.

COMMERCIAL BANKS

28. If you are doing business in a state or states which through legislation, court decision or otherwise have restricted or abolished those contract provisions and creditor remedies listed in Question 27, in your judgment has the inhibiting legislation resulted in:

- a. a decrease in the availability of credit? yes no
- b. an increase in credit or collection costs? yes no

Please explain making reference where possible to factors such as 1) availability of credit - percentage of rejected applicants, security requirements, increase in rate, change in other terms; 2) credit and collection costs - delinquency and default rates, screening of applicants, collection of debts. If there have been no changes in availability or costs - briefly summarize the steps taken to avoid such action:

29. In your judgment would the enactment of additional inhibiting legislation require the employment of more stringent credit granting criteria than presently utilized? yes no

Please explain:

IN THE
Supreme Court of the United States
October Term 1971

No. 70-6

NELSON SWARD, ET AL., *Appellants,*

WILLIAM M. LEWROX, ET AL., *Appellees.*

On Appeal From the United States District Court for the
Eastern District of Pennsylvania

BRIEF FOR
THE AMERICAN BANKERS ASSOCIATION
APPEARING AS AMICUS CURIAE

MATTHEW HALE
General Counsel
The American Bankers Association
1120 Connecticut Avenue, N.W.
Washington, D. C. 20006

November 3, 1971

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1971

No. 70-6

NELLIE SWARB, ET AL., *Appellants*,

v.

WILLIAM M. LENNOX, ET AL., *Appellees*.

On Appeal From the United States District Court for the
Eastern District of Pennsylvania

**BRIEF FOR
THE AMERICAN BANKERS ASSOCIATION
APPEARING AS AMICUS CURIAE**

**INTEREST OF AMICUS CURIAE THE AMERICAN
BANKERS ASSOCIATION**

The American Bankers Association (the A.B.A.) which files this brief with the leave of this Court¹ is a trade association having as members more than 13,000 commercial banks, large and small, located in every state in the country.

¹ The A.B.A.'s motion for leave to file its brief as *amicus curiae* was granted on October 26, 1971.

During the years since World War II, the commercial banking industry has invested increasingly large amounts in the field of consumer and mortgage lending. In 1970 commercial banks made consumer loans totaling \$39.1 billions and \$37.9 billions of such loans were repaid. On December 31, 1970 the total of such loans outstanding amounted to almost \$42 billions. On December 31, 1970 commercial banks held \$42.4 billions of mortgages on one to four-family houses.

These consumer loans and residential mortgages are made under the provisions of applicable state and Federal laws, including the various titles of the Consumer Credit Protection Act (P.L. 90-321; 15 U.S.C. 1601), state usury statutes, and other state and Federal laws providing and restricting creditors' remedies and debtors' rights.

The banking industry, while highly regulated by both Federal and state authorities, is composed of privately financed institutions which must earn sufficient income to pay their expenses and to yield for their stockholders an adequate return on their investments. So, although banks are called on frequently to perform various functions on a public interest basis, for no charge or for charges less than sufficient to pay the cost of those functions, in the long run they must recover an adequate return on each major segment of their operations, including such major segments as consumer or mortgage loans. In other words, the aggregate finance charges for various classes of consumer and mortgage loans must be sufficient to cover the cost of funds to the lender, the cost of making, administering and collecting loans, and the losses incurred, together with a profit sufficient to induce the

lender to undertake and carry on the business. An increase in the cost of lending or in the ratio of losses to loans will either increase the finance charge which must be borne by the consumers who repay the loans, or eliminate from the category of prospective borrowers or purchasers those persons presenting the highest cost of collection or the highest risk of loss. An increase in the finance charge will impose an additional burden on the vast majority of consumers who repay their loans without delay or default. An increase in the qualifications of prospective customers will compel those eliminated from consideration by any class of lenders to go to higher cost lenders, possibly to loan sharks, or to go without the consumer goods or home improvements they would like to buy.

Achieving and maintaining a fair and acceptable balance between the interests of borrowers and of lenders in this situation is essential, but it is not easy or simple.

The banking industry is concerned over the possibility that the many interrelated factors which must be considered in order to achieve and maintain such a balance may not be taken into account in this case and other cases involving attempts to invalidate significant elements of this balanced consumer financing structure on broad constitutional grounds.

SUMMARY OF ARGUMENT

The American Bankers Association is primarily concerned with the broad approach and sweeping results indicated by the appellants, by various *amici*, and by the Court's stay, issued April 21, 1971.

As a general rule, The American Bankers Association, as a nationwide trade association, does not take

an active part in legislation or litigation relating only to a single state, viewing such matters as of concern to the banks and banking association of that state. However, in the pending case, it appears that constitutional and other issues are raised, the significance of which far transcends the questions raised by the Pennsylvania confession of judgment procedures.

Accordingly, The American Bankers Association presents to this Court background information on the consumer credit industry, on consumer and mortgage financing, and on current legislative developments, which it is hoped will help the Court in deciding these issues.

Further, The American Bankers Association, as indicated in its motion for leave to file this brief, will present arguments:

(1) in support of the District Court's ruling that the waiver of notice permitted under the Pennsylvania confession of judgment procedure is not unconstitutional when entered into "intentionally, understandingly, and voluntarily";

(2) in support of the District Court's ruling that the procedure established by that Court, to insure that in individual cases such waivers were entered into "intentionally, understandingly, and voluntarily", should be applied prospectively and should not invalidate judgments already entered;

(3) in support of the District Court's ruling that no substantial evidence had been introduced in this case indicating any need for a similar procedure in cases involving real estate mortgages;

(4) in opposition to the position set forth in this Court's stay, issued April 21, 1971, prohibiting

execution on and sale of real or personal property under any judgment based on an instrument containing a waiver of notice and other rights under the Pennsylvania confession of judgment procedure, even though the judgment in question was not obtained by means of the confession of judgment procedure, but through regular adversary proceedings; and,

(5) in opposition to the position indicated in the briefs submitted by *amici* California Rural Legal Assistance, et al., and *amicus* National Consumer Law Center to the effect that this Court should, in this proceeding, review the so-called confession of judgment procedures of California and similar procedures in other unspecified states.

We shall seek to do so as briefly as possible, referring primarily to the briefs submitted by the Pennsylvania Bankers Association, the Pennsylvania Credit Union League, the Pennsylvania Savings and Loan League, and the Pennsylvania Land and Title Association.

BACKGROUND INFORMATION

CONSUMER CREDIT

Consumer credit represents a significant proportion of the outstanding private debt in the United States. It is extended by a variety of lending institutions, including personal and sales finance companies, credit unions, and commercial banks, and is used to purchase a wide range of goods and services. It is an integral part of our nation's economy. (Home mortgage credit, usually the largest single item of consumer credit, is treated separately below because of its special charac-

teristics and for the most part is not included in the following discussion of consumer credit.)

Direct consumer lending practices developed and grew in this country because lenders in many competing financial institutions were able to make a profit on consumer loans. In the past, one important fact in this profitability was that losses on consumer loans were relatively small. A change in this one fact can substantially affect the entire consumer lending business.

Growth and Importance

One financial observer has said that the consumer loan market "... was born in the early 1900's, grew up in the 1920's, and matured in the 1930's".¹ To continue the metaphor, it could also be said that the consumer loan market attained major stature in the post-World War II period. In 1945, total consumer credit outstanding was only slightly in excess of \$5.5 billions. By the end of 1970, however, it had increased to \$125 billions, accounting for more than 20 percent of all individual and noncorporate debt and only slightly less than 10 percent of the total private debt outstanding (including that of private corporations). The percentages at the end of World War II were 16 and 6 1/2, respectively.

¹ Robert P. Shay, "Major Developments in the Market for Consumer Credit Since the End of World War II," *Journal of Finance*, May 1966, p. 369. For a discussion of consumer credit in general, see: U.S. Board of Governors, Federal Reserve System, *Consumer Instalment Credit*, Govt. Print. Office, Washington, D.C., 1957; Paul McCracken, *Consumer Instalment Credit and Public Policy*, Univ. of Michigan, Ann Arbor, Michigan, 1965; and American Bankers Association, *Instalment Credit*, 1964.

The extension of consumer credit on an instalment basis had its genesis in the early 1900's. Prior to that time, capital had not been attracted to any large degree into the cash credit business. Instalment sales financing, in which credit was extended indirectly to borrowers by means of purchasing the instalment contract or note from the seller of merchandise, had been widely used, however. Indeed, as early as 1850 the Singer Sewing Machine Company was making extensive use of an instalment plan, and others soon followed. However, low interest ceilings imposed under existing usury statutes made direct instalment lending unprofitable.

The practice of direct instalment lending, under which credit is extended by an institution directly to a borrower, did not develop on a major scale until the early 1900's, when many states established small loan laws and relaxed their usury statutes.² As a result, funds were diverted to the consumer loan market from other money markets. Credit unions, industrial banks (Morris Plan Banks), and consumer finance companies were established and became the primary institutions serving the borrowing needs of the consuming public.

The growth of the nation's distribution and production capacity during this early period of the 1900's also played an important role in the growth and development of these institutions. Similarly, the upsurge in the consumption of goods and services by households

² In 1911, the Russell Sage Foundation paved the way for direct lending to consumers by helping Massachusetts draft a comprehensive small loan law, which other states followed in enacting. See The American Bankers Association, *Instalment Credit*, p. 4.

during the post-World War II period resulted in a significant increase in the use of consumer credit. Personal consumption expenditures had increased by more than fourfold from \$121 billions in 1945 to more than \$615 billions in 1970. More to the point, those types of consumer expenditures which represent so-called "household capital" (automobiles, furniture, and household equipment) and depend to a large extent on the extension of credit for their formation, increased even more rapidly during the postwar period. Indeed, if consumer expenditures on residential construction are included, consumer capital expenditures began exceeding expenditures for producer capital as early as 1950. Much of this household capital formation has depended on the extension of consumer credit, particularly instalment lending.³

Initially, the rise in consumer expenditures following World War II reflected the demand for durable goods on the part of consumers which had largely gone unmet, as resources were diverted to meeting the war effort. The diversion of resources from meeting consumer demand to meeting military requirements was accomplished in large part by the establishment in 1941 of consumer credit controls, in the form of Regulation W, which set limits on downpayments and maturities in order to discourage the use of credit for consumer purposes. As a result consumer credit

³ Shay, "Major Developments in the Market for Consumer Credit Since the End of World War II," pp. 370-71.

outstanding was cut nearly in half between 1941 and 1945.⁴

In the absence of these controls during the postwar period, consumer credit grew rapidly. In part, this was a reflection of the absence of controls themselves. To a greater degree, however, it was a reflection of the tremendous industrial capabilities which emerged for producing goods on a mass scale, rising consumer expectations and demand induced by mass-media advertising, and the increased consumer willingness to use, and ability to obtain, credit for the purpose of purchasing consumer items.

Reflecting these and other factors, consumer installment credit has increased substantially since the end of World War II. From \$4.5 billions in 1939, consumer installment credit increased to more than \$100 billions in 1970, as shown in Table 1. The largest share of consumer installment credit extended during this period financed the purchase of automobiles, although the share which auto financing makes up of the total has declined somewhat since the mid-1950's, as shown in the table. Loans used to purchase all other consumer goods have diminished somewhat in relative importance since the early postwar period, while the relative importance of personal loans has increased.

⁴The imposition of priority and allocation controls including rationing, which virtually or completely eliminated the manufacturing of automobiles and other consumer goods for the civilian market, was also a major factor in this development.

Table 1

TOTAL INSTALMENT CREDIT, 1939-70

End of Year	Total	Automobile Paper	Other Consumer Goods Paper	Repair and Modernization Loans	Personal Loans
Millions of Dollars					
1939	\$ 4,503	\$ 1,497	\$ 1,620	\$ 298	\$ 1,088
1945	2,462	455	816	182	1,009
1950	14,703	6,074	4,799	1,016	2,814
1955	28,906	13,460	7,641	1,693	6,112
1960	42,968	17,658	11,545	3,148	10,617
1965	71,324	28,619	18,565	3,728	20,412
1970	101,161	35,490	29,949	4,110	31,612
Percentage Distribution					
1939	100.0%	33.2%	35.9%	6.6%	24.2%
1945	100.0	18.5	33.1	7.4	41.0
1950	100.0	41.3	32.6	6.9	19.1
1955	100.0	46.6	26.4	5.9	21.1
1960	100.0	41.1	26.9	7.3	24.7
1965	100.0	40.1	26.0	5.2	28.6
1970	100.0	35.0	29.6	4.1	31.2

Source: Board of Governors, Federal Reserve System.

In addition to the large increase which occurred in consumer instalment credit during this period, a significant change also occurred in the source of loanable funds for consumer purchases during the postwar period. As shown in Table 2, both commercial banks and credit unions became relatively more important as consumer lenders. At the end of 1939, for example, commercial banks held 24 percent of the total consumer credit outstanding. During the postwar years, however, commercial banks rapidly increased their

holdings of consumer loan paper, and by 1970 held more than 41 percent of the total, as shown in Table 2.

Table 2

CONSUMER INSTALMENT CREDIT BY SOURCE OF FUNDS, 1939-70

End of Year	Total	Financial Institutions						Retail Outlets
		Total	Commercial Banks	Finance Companies	Credit Unions	Other		
		Millions of Dollars						
1939	\$ 4,503	\$ 3,065	\$ 1,079	\$ 1,836	\$ 132	\$ 18	1,438	
1945	2,462	1,776	745	910	102	19	686	
1950	14,703	11,805	5,798	5,315	590	102	2,898	
1955	28,906	24,398	10,601	11,838	1,678	281	4,508	
1960	42,968	36,673	16,672	15,435	3,923	643	6,295	
1965	71,324	61,533	28,962	24,282	7,324	965	9,791	
1970	101,161	87,064	41,895	31,123	12,500	1,546	14,097	
Percentage Distribution								
1939	100.0%	68.1%	24.0%	40.8%	2.9%	0.4%	31.9%	
1945	100.0	72.1	30.3	37.0	4.1	0.8	27.9	
1950	100.0	80.3	39.4	36.1	4.0	0.7	19.7	
1955	100.0	84.4	36.7	41.0	5.8	1.0	15.6	
1960	100.0	85.3	38.8	35.9	9.1	1.5	14.7	
1965	100.0	86.3	40.6	34.0	10.3	1.4	13.7	
1970	100.0	86.3	41.4	30.8	12.4	1.5	13.9	

Source: Board of Governors, Federal Reserve System.

The increased willingness on the part of commercial banks to make consumer loans reflects a number of factors. In the first place, weak demand for business loans during the 1930's induced banks to search for alternative loan outlets. The favorable repayment record of households during World War II, when many had expected defaults to increase, induced banks to shift additional funds to consumer lending. Banks

realized that prudent lending procedures could result in low losses on consumer loans, thus improving the profitability of establishing or expanding consumer loan departments. Furthermore, consumer loans had a higher yield rate relative to other loans, thereby enhancing profitability. Finally, the massive increase in the production and consumption of consumer goods heavily dependent on credit extension resulted in the volume of credit needed to make mass-financing techniques by banks feasible. In sum, the initial involvement of commercial banks in consumer financing during the pre-war period represented a decision to divert funds from the competing alternative of making business loans in the anticipation of realizing greater yields in the consumer loan market. Furthermore, the increased involvement of both commercial banks and credit unions in providing consumer instalment credit reflected the more favorable terms on which they extended credit relative to other competing institutions.⁵

Commercial banks have extended credit to consumers in a variety of ways. The first has been to make a loan directly to a consumer for the purpose of purchasing a good or obtaining a service. The second has been to purchase instalment paper from dealers in durable goods, thus making funds available to the consumer indirectly. The third way is even more indirect. It has involved making funds available to sales finance or personal loan concerns. These concerns in turn purchase consumer instalment paper themselves or make loans directly to consumers.⁶

⁵ See Paul F. Smith, *Consumer Credit Costs, 1949-59* (Princeton, N.J.: Princeton University Press, 1964).

⁶ See Roland I. Robinson, *The Management of Bank Funds*, New York, 1962, pp. 265-85.

While commercial banks have increased their holdings of consumer loans during the postwar period, they continue to rely heavily on purchasing consumer loans from another party. Indeed, as shown in Table 3, commercial banks hold a larger share of their automobile paper in the form of loans purchased from other lenders than in loans they have made directly to consumers. In 1970, for example, nearly 30 percent of the consumer loans held by commercial banks were in purchased automobile paper, while little more than 18 percent were held in automobile loans made directly.

Table 3

CONSUMER INSTALMENT CREDIT HELD BY COMMERCIAL BANKS

End of Year	Total	Automobile Paper		Other Consumer Goods Paper	Repair and Moderniza- tion Loans	Personal Loans
		Purchased	Direct			
Millions of Dollars						
1939	\$ 1,079	\$ 237	\$ 178	\$ 9166	\$ 135	\$ 363
1945	745	66	143	114	110	312
1950	5,798	1,177	1,294	1,456	834	1,037
1955	10,601	3,243	2,062	2,042	1,338	1,916
1960	16,672	5,316	2,820	2,759	2,200	3,577
1965	28,962	10,209	5,659	4,166	2,571	6,357
1970	41,895	12,433	7,587	8,633	2,760	10,482
Percentage Distribution						
1939	100.0%	22.0%	16.5%	15.4%	12.5%	33.6%
1945	100.0	8.9	19.2	15.3	14.8	41.9
1950	100.0	20.3	22.3	25.1	14.4	17.8
1955	100.0	30.6	19.5	19.3	12.6	18.1
1960	100.0	31.9	16.9	16.5	13.2	21.5
1965	100.0	35.2	19.5	14.4	8.9	21.9
1970	100.0	29.7	18.1	20.6	6.6	25.0

Source: Board of Governors, Federal Reserve System.

Although commercial banks are relatively more important as providers of consumer credit at the present time compared with the earlier postwar years, they have tended in recent years to maintain consumer loans at a given percentage of total loans, with consumer loans as a percentage of all loans at commercial banks not increasing substantially since early 1950. As shown in Table 4, consumer instalment loans as a percentage of all loans of insured commercial banks stood at slightly more than 15½ percent in 1970, compared with about 12½ percent in 1950. Thus, the relative increase in the importance of commercial banks in the consumer loan market has reflected the general upward rise in the availability of funds for lending purposes at commercial banks which occurred during the postwar period, rather than any major diversion of funds to consumer loans from other competing intra-bank uses. However, consumer instalment loans do represent a larger share of all loans made by commercial banks in the postwar period compared with that of the prewar years.

Table 4

LOANS TO INDIVIDUALS HELD BY INSURED COMMERCIAL BANKS,
1945-70

End of Year	Total Loans	Loans to Individuals		Loans to Individuals as a Percentage of Total Loans	
		Instalment 1	Single-Payment	Instalment	Single-Payment
		(Millions of Dollars)			
1945	25,769	\$ 889	\$ 1,472	3.4%	5.7%
1950	52,482	6,584	3,477	12.5	6.6
1955	83,628	11,920	5,238	14.3	6.3
1960	119,878	18,655	7,722	15.6	6.4
1965	142,718	21,183	9,340	14.8	6.5
1970	314,142	49,075	16,929	15.6	5.4

¹ Includes bank credit cards and related plans.

Source: Federal Deposit Insurance Corporation.

The ability of commercial banks and other lenders to increase their holdings of consumer loan paper has reflected a greater willingness and ability on the part of households to incur additional debt for the purchase of "household capital". The willingness to incur larger debt for such purposes reflects not only an increased ability to service outstanding debt but also a change in attitude regarding debt and a general unwillingness to set aside funds before purchasing expensive household capital items. In essence, buying such items by using credit is "forced savings" out of income. The increased willingness to incur instalment debt also reflects a greater degree of wealth among households that not only can be used for pledging as collateral in making loans, but adds to the consumers' feelings of general financial well-being and capability of handling increased obligations.

The willingness on the part of the consumer to incur increased debt is clearly borne out in Table 5. As shown in that table, consumer instalment credit has increased substantially compared to consumer income. In 1939, for example, consumer instalment credit outstanding was equal to $6\frac{1}{2}$ percent of disposable personal income in that year. By 1970, however, consumer instalment credit outstanding represented over $14\frac{1}{2}$ percent of disposable personal income that year. These figures clearly show that consumers have increased their debt obligations, at least those for instalment credit purposes, more rapidly than they have increased their income, and that a greater share of presently-earned income is used to service household debt.

Table 5

CONSUMER INSTALMENT CREDIT OUTSTANDING AND DISPOSABLE PERSONAL INCOME, 1939-70

Year	Consumer Instalment Credit Outstanding at Year End	Disposable Personal Income	Consumer Instalment Credit Outstanding as a Percentage of Disposable Personal Income
(Millions of Dollars)			
1939	\$ 4,503	\$ 70,329	6.4%
1945	2,462	150,246	1.6
1950	14,703	206,940	7.1
1955	28,906	275,348	10.5
1960	42,968	350,044	12.3
1965	71,324	473,240	15.1
1970	101,161	687,773	14.7

Source: Board of Governors, Federal Reserve System, and Office of Business Economics, U.S. Department of Commerce.

It should be pointed out, however, that the increased use of instalment credit relative to income by consumers is not an isolated phenomenon, but reflects a willingness of households to incur more debt in general. That is to say, consumer instalment debt has not increased relative to other household debt during the postwar period. As shown in Table 6, consumer instalment credit accounted for 21 percent of the total liabilities of households in 1970 compared with 19 percent in 1950.

Table 6

TOTAL LIABILITIES OF HOUSEHOLDS, 1945-70

End of Year	Total	Credit Market Instruments				All Other
		Mortgages	Consumer Credit		Bank Loans N.E.C. and Other Loans	
			Instalment	Noninstalment		
<u>Billions of Dollars</u>						
1945	\$ 35.0	\$ 18.5	\$ 2.5	\$ 3.2	\$ 4.8	\$ 6.0
1950	77.4	45.0	14.7	6.8	6.7	4.4
1955	144.9	89.8	28.9	9.9	8.5	7.7
1960	226.2	146.0	43.0	13.2	14.2	9.9
1965	349.4	220.6	71.3	19.0	22.9	15.5
1970	482.0	293.1	101.2	25.6	41.7	20.5
<u>Percentage Distribution</u>						
1945	100.0%	52.9%	7.1%	9.1%	13.7%	17.1%
1950	100.0	58.1	19.0	8.8	8.7	5.7
1955	100.0	62.0	20.0	6.8	5.9	5.3
1960	100.0	64.5	19.0	5.8	6.3	4.4
1965	100.0	63.1	20.4	5.4	6.6	4.4
1970	100.0	60.8	21.0	5.3	8.7	4.3

Source: Board of Governors, Federal Reserve System.

Credit Factors and Consumer Loans

There is always an element of uncertainty, of course, in any credit transaction. Creditors can never be absolutely certain that debtors will fulfill their end of the obligation by repaying the loan. Most lenders, therefore, try to evaluate prospective borrowers critically in order to determine ahead of time whether or not the probabilities are that the debtor will be able to repay the obligation. It must be recognized that creditors will always suffer some losses on a number

of transactions and for this reason must be willing to set aside adequate reserves and be willing to accept some losses and charge-offs.

The factors which determine a good credit risk in instalment lending are fairly well known and widely used by creditors. For example, in a study conducted by the National Bureau of Economic Research in 1941⁷ it was found that one of the most important indicators of the borrower's credit dependability was stability of residence. For instance, those borrowers who had lived at the same address for 6 years or more had a better than average record on loan repayment. In addition, tenure in employment showed similar positive indications of credit worthiness, as did permanence in employment. In both of these cases, stability appeared to be the best test of a good borrower. It was also found that borrowers owning securities, a bank account, or some real estate had better than average credit records. The study also showed that income was an important, but not a conclusive, factor in reducing risk in the extension of consumer credit. Other than those borrowers with very sizeable incomes, whose risks were markedly below average, differences in credit worthiness could not be determined for other income groups. That is to say, income did not provide an adequate indicator of credit performance on the part of consumer borrowers. Other factors, such as the age of the borrower, marital status, sex, or number of dependents did not show any conclusive relationship to credit experience or worthiness.

⁷ David Durand, *Risk Elements in Consumer Instalment Financing* (Princeton N.J.: Princeton University Press, 1941).

In a study by Paul Smith⁸ of the direct instalment loans made by one commercial bank from 1952 to 1958, it was found that an inverse relationship existed between delinquency rates and loan maturity, borrower's income, age, length of time in last residence, and time on last job. Higher delinquency rates were found for renters than for homeowners, for those with no telephone, for persons without a bank account, and for men than for women borrowers.

Similar results with respect to repossession rates on new cars financed by a large sales finance company were reported in another study.⁹ Repossession rates were found to vary positively with the maturity of loans for the purchase of new cars, but inversely with that for used cars. They also showed a positive relationship to the percentage of new car costs financed, but inversely with the percentage financed on used cars. The results for income, age, length of residence and employment, homeownership, occupation, and marital status were similar to those found in the study by Paul Smith.

In an even more recent study conducted by the National Bureau of Economic Research,¹⁰ it was found that higher downpayment requirements were consistently associated with lower delinquency, repossession, and loss rates. In the case of new auto loans,

⁸ Paul F. Smith, "Measuring Risk on Instalment Credit," *Management Science*, November 1964, pp. 327-340.

⁹ Paul W. McCracken, *Consumer Instalment Credit and Public Policy* (Ann Arbor, Michigan, 1965).

¹⁰ Geoffrey H. Moore and Philip A. Klein, *The Quality of Consumer Instalment Credit* (New York: National Bureau of Economic Research, 1967).

shorter maturities were associated with smaller risk of credit difficulty. In the case of used cars, short maturities typically have been associated with poorer credit performance.

Using data taken from a 1954-55 survey of new-car financing by the Federal Reserve Board, the National Bureau study concluded that the highest rates of collection difficulty were for borrowers with zero or negative net worth, borrowers with no liquid assets, and borrowers with incomes under \$3,000 (along with the unemployed). The lowest rates were for married borrowers under 45 with no children, for farm operators and clerical and sales personnel, and for borrowers with high income and substantial liquid assets. Thus, the study concluded the ultimate outcome of a consumer loan is related to credit terms such as maturity and especially downpayment, while such characteristics of borrowers as income, liquid-asset holding, and "life-cycle status" also bear a relationship to repayment experience.

The purpose of such studies has been to identify those factors which creditors can use to indicate, in all probability, the degree of repayment risk involved in extending credit to a prospective borrower. Thus, by considering carefully the terms on which loans are offered and by determining the characteristics of the prospective borrower, the lender is capable, in very broad terms at least, of determining some degree of credit risk. The ability to foretell risk and reduce losses is central to providing an adequate rate of return on consumer loans and thereby help to assure a continued flow of funds for consumer lending purposes.

The Consumer Loan Contract

The extension of credit to consumers for the purchase of goods or services on an instalment basis typically involves the use of some form of security instrument. This may take the form of either a conditional sales contract, a chattel mortgage, or a bailment lease. Under a conditional sales contract, which is the most widely used form of contract, full ownership of the item purchased by the borrower is transferred to him when all instalments on the loan have been made, possession of the item is with the borrower during the repayment period, and authority of the creditor to repossess the goods purchased is granted in event of default. In about half of the cases of instalment transactions made by a retail seller, the debt paper is sold to either banks or sales finance companies.

Most lenders use a standard contract in extending consumer credit. The use of such standardized contracts serves a useful economic function. For one thing, they allow the lender to process a large volume of loans in a simple and time-saving manner. Thus, costs are reduced and greater incentive exists for allocating funds into the consumer loan market than if the contract for each transaction had to be handled on an individual basis. In a word, standardized contracts permit automatic processing of transactions, thereby resulting in a greater savings in time, effort, and cost on the part of lenders. In addition, administration and planning for risk is improved by the standardized contract. Furthermore, such contracts more effectively use the lessons of past loan experience in order to reduce risk and possible losses.

In order to provide additional security on installment loans, lenders frequently use a variety of clauses that further reduce the risk of loss in the case of delinquency or nonrepayment.¹¹ These clauses may be included in consumer loan contracts where some form of consumer good is involved, but they take on even more importance in the case of personal loans where the loan is unsecured. These clauses may take the form of a separate promissory note, a judgment note, or a wage assignment. Not all of these clauses are permitted by state law, however. Even where included they may not be strictly enforced by the creditor, but may be used in an effort to remind the borrower of his obligation and thereby avert a possible loss.

The Loss Experience

No matter how well a creditor has screened prospective borrowers when extending credit, losses are bound to occur. Estimates are, however, that 90 percent of the accounts will be repaid on time and in full. In the remainder of the cases, the account may become delinquent as a result of legitimate problems suffered by borrowers. These could include illness, strikes, loss of employment, marital difficulties, or other factors that may be outside the control of the debtor. In most cases, the creditor will attempt to restructure the

¹¹ In its list of contract provisions and creditors' remedies, included in part III of its questionnaire, the National Commission on Consumer Finance included waiver of buyer defenses, acceleration provisions, wage assignments, cross collateral, confessions of judgment, attorney fees, security interests or repossessions, and "other". See page 13 of the A.B.A.'s motion for leave to file this brief.

debtor's obligation to fit his needs and allow payment to be made or to postpone the obligation until it can be fulfilled. In cases involving fraud and deceit on the debtor's part, the creditor takes action to avoid having to realize a loss on the debt. The creditor may be able to repossess the consumer item which was purchased and used as collateral by the borrower. In other cases, where collateral does not exist, the lender may resort to filing suit for repayment. In many cases, the creditor may consider that the time and expense involved do not warrant attempts to carry the collection process to that extreme, and he may be content to write the loan off at a loss. Such a loss increases the costs of supplying funds by the creditor and, unless offset by a higher yield on loans made to other borrowers, will reduce the creditor's incentive to supply additional funds for consumer loan purposes.

Generally speaking, loss experience has declined somewhat during the post-World War II period. For example, in the 1947-51 period the delinquency rate on consumer instalment loans was over two percent of the loans outstanding at commercial banks. However, in recent years it has averaged less than two percent, as shown in Table 7. As also shown in the table, delinquency rates on consumer loans have been subject to rather wide swings during the postwar period. Generally, rates have been higher during postwar periods of economic contraction. Thus, delinquency rates in the periods of 1948-49, 1953-54, 1957-58, 1960-61, and 1970 have averaged somewhat higher than in other periods characterized by business expansion.

Table 7

PERCENT OF CONSUMER INSTALMENT LOANS AT
COMMERCIAL BANKS DELINQUENT 30 DAYS
AND OVER

Year	Rate	Year	Rate
1947	2.40	1959	1.65
1948	2.02	1960	1.76
1949	2.67	1961	1.68
1950	2.09	1962	1.64
1951	2.15	1963	1.76
1952	1.92	1964	1.70
1953	1.98	1965	1.65
1954	1.65	1966	1.75
1955	1.50	1967	1.71
1956	1.52	1968	1.67
1957	1.57	1969	1.67
1958	1.55	1970	1.85

Source: Instalment Credit Committee, American Bankers Association.

Indeed, one study on the consumer loan market has concluded that "... the general health of the country is probably the most important variable affecting loan experience"¹² The authors of that study pointed out that not only delinquency rates, but repossession and loss rates, as well, rise during recessions and fall during expansions. This turn of events is clearly understandable. When hours of work are reduced and unemployment rises, income declines. Debtors who suffer loss of income find it difficult to make repayment on loans which they have made. A definite sequence of events appears to occur with regard to credit difficulties in periods of business contraction. Understand-

¹² Moore and Klein, *The Quality of Consumer Credit*, p. 133.

ably, delinquent accounts emerge initially, followed by an increase in repossessions, and finally in loan charge-offs and losses. Collection difficulties first manifest themselves when monthly payments become overdue, which may then lead to voluntary or involuntary repossession of the article securing the loan (if there is any), and its eventual sale, and the final write-off of losses on the creditor's books. Even in the case of a sale of the repossessed article, a loss may have been incurred by the creditor, since it may have been resold in a market characterized by falling prices on used durable goods in a business recession. Depreciation of the article may also tend to reduce its resale value below the initial dollar amount borrowed.

It is difficult to determine what this loss experience over the course of postwar business cycles may have meant in terms of the dollar costs of consumer credit. It is to be expected that the increase in losses and charge-offs experienced toward the end of postwar contractions and during business contractions would result in higher costs to creditors and, if not absorbed by creditors, in higher costs to prospective consumer loan customers. Yields on consumer loans, however, tend to be high toward the end of expansions and lower during business contractions for reasons associated primarily with the demand for such loans, overshadowing those on the costs side resulting from higher loan losses.

It should also be noted that loss experience on consumer loans varies widely by type of lending institution. It has been shown, for example, that loan losses at commercial banks are significantly below those for other consumer lending institutions. For example, in

a study of consumer credit costs from 1949 to 1959, losses on consumer credit at commercial banks ran only 15 cents per \$100 of outstanding credit. As shown in Table 8, this was substantially less than that experienced by credit unions and other institutions.

Table 8

LOSSES ON CONSUMER CREDIT BY LENDER, 1959

(Dollars per \$100 of Average Outstanding Credit)

	Actual Losses ¹
Nine Commercial Banks .....	.15 ²
All Federal Credit Unions .....	.38
Ten Sales Finance Companies	1.11
Nine Consumer Finance Companies	1.70

¹ Net of recoveries.

² Somewhat higher bank losses are shown in Table 9 below.

Source: Paul F. Smith, *Consumer Credit Cost, 1949-59, A Study of the National Bureau of Economic Research*, (Princeton, N.J.: Princeton University Press, 1964).

It should be pointed out that this is not a complete indication of the total costs of risks and it understates the cost differential associated with different degrees of risks. It does not include losses sustained by dealers under recourse agreements, nor the differentials in the costs of investigation and collection associated with differences in credit quality. Many of the costs of handling high-risk loans, therefore, cannot be segregated from the rest of the various operating expenses. One observer has pointed out that "If all costs associated with variations in risk could be isolated, risks would undoubtedly play a substantial

part in explaining differences in operating costs among lenders."¹³

Pricing Consumer Credit

The price which the borrower pays for obtaining credit reflects the interaction of both the demand for, and the supply of, loanable funds. In the case of consumer credit, the price which the consumer pays for obtaining credit is a reflection of both the willingness on the part of the consumer, therefore, to incur debt for consumption purposes and the costs which creditors incur in providing funds for that purpose. Costs are important from the creditor's standpoint because they help to determine the net yield from alternative avenues of investing and lending and, therefore, the extent to which funds will be allocated among competing ends. In the case of both single-purpose lenders, such as sales and personal finance companies, and multi-purpose lenders, such as commercial banks, an adequate rate of return on consumer lending activities will determine how successfully those institutions will be in competing for overall funds made available from savings in the economy. In the case of multi-purpose lenders, it will determine the extent to which funds will be provided for consumer lending in relationship to other investment and lending alternatives.

A wide variety of costs are involved in the extension of consumer credit, ranging from the direct costs of processing consumer loans and indirect costs associated with general overhead of the business, to the lender's costs of obtaining funds and incurring

¹³ Smith, *Consumer Credit Costs*, 1949-59, pp. 81-82.

losses on loans extended. The costs shown in Table 9 are illustrative of those incurred by commercial banks in extending credit on an instalment basis. Although the figures shown in that table also include the costs and income for non-consumer instalment loans, as well as those for consumer instalment loans, they are indicative of the types of costs that need to be covered in extending credit to consumers. (Non-consumer instalment debt accounted for less than 10 percent of the total dollar volume outstanding for the banks shown in the table.)

As shown in the table, the lender's cost of money is the largest single cost component in the instalment credit function of commercial banks. Another large component is the costs under processing expenses of which wages, salaries, and benefits comprise the largest share. In addition, some share of the general overhead costs which can be allocated to the instalment loan function is included as a component of overall costs in this department of the bank. In addition to these costs, those arising from losses on loans are also included. As shown in Table 9, losses on loans were in the neighborhood of three and one-half dollars per \$1,000 of outstanding instalment loans for these banks. Should any of these costs increase, either net earnings must decline or the increased cost must be passed on to the borrower in the form of a higher cost for credit. In the first instance, that of reducing net earnings, the inducement to place funds in the instalment loan function will be reduced, while in the second instance, that of higher borrower costs, prospective debtors will no longer be as willing or able to service increased debt obligations.

Table 9

COSTS OF INSTALMENT LOAN FUNCTION IN COMMERCIAL BANKS, 1970

(Dollar Cost Per \$1,000 of Instalment Loan Portfolio of 1,003 Banks)

Item	665 Banks Less Than \$50 M in Deposits	261 Banks \$50 M to \$200 M in Deposits	77 Banks More Than \$200 M in Deposits
Income	\$106.39	\$105.86	\$110.94
Expenses			
Processing Expenses, Total	25.23	27.5	34.43
Officers Salaries	7.25	5.90	4.26
Processing Salaries and Wages ..	9.20	10.56	15.34
Fringe Benefits	2.44	2.63	3.39
Furniture and Equipment	1.03	.87	1.10
Computer Service Expenses	2.01	3.55	4.72
Printing, Stationery, Supplies ..	1.09	1.14	1.48
Postage, Freight, Delivery .....	.62	.66	1.07
Telephone and Telegraph .....	.83	.97	1.31
Fees, Legal and other .....	.76	1.24	1.76
Overhead Expenses, Total	35.58	37.93	45.97
Publicity and Advertising	2.11	2.04	1.90
Creditors and Other Insurance ..	1.07	.88	.88
Share of Occupancy Expense ...	2.76	2.77	3.45
Other	4.41	4.72	5.31
Net Earnings	70.81	67.73	64.97
Losses	3.46	3.14	3.71
Cost of Money	36.68	35.64	38.46
Net Earnings After All Adjustments	30.67	28.95	22.80

Source: Functional Cost Analysis, 12 Federal Reserve Districts, 1970.

Another way of viewing the pricing decisions made in the extension of consumer, or other, credit, is in terms of the *marginal* (or additional) costs involved in extending loans and the marginal *revenue* obtained by doing so. Theoretically at least, the rational creditor will lend up to the point at which the marginal revenue obtained from making an additional loan is just equal to the marginal costs of making that loan. For a bank or any other lender to extend operations to such a scale where the added costs exceeded the added revenue from making one more loan, would not be rational from an economic standpoint, since such a decision would result in a loss of revenue. Likewise, it would pay to expand loans if the marginal revenue is exceeding the marginal costs of making a given number of loans. Using this approach to describe the pricing decisions of lenders, it is clear that a rise in costs, for example, in the form of additional loan losses, will increase the marginal costs of extending credit. Unless matched by a proportionate increase in marginal revenue, in the form of a higher price (interest rate) charged to borrowers, credit extension will be reduced and funds diverted to more attractive uses.

In any event, it is apparent that increased loan losses will produce higher costs. The absence of adequate creditors' remedies would, of course, tend to heighten such losses. In any event, such higher costs will result in higher loan costs to the ultimate borrower and/or reduced availability of credit for consumer purposes. Over time, of course, the demand for consumer credit will increase as a result of increased household income and wealth and continued propensity to incur and service a larger debt load. Such a rise in demand, of course, could support the higher price and more than offset the decline in availability of credit which may

result. Nonetheless, the increased costs incurred will be borne by those obtaining such credit and represent a form of income forgone by those same individuals, since in the absence of such costs the price they pay would have been correspondingly lower.

Studies of Effects of Changes in Costs and Changes in Creditors' Remedies

The significance of confession of judgment clauses (and the other creditors' remedies) in the area of costs relates both to the amount of the losses and to the amounts spent on processing costs. These creditors' remedies help to reduce the amounts finally lost, to the extent that repossession or seizure of chattels or real estate and subsequent sale thereof bring in funds, or funds are obtained out of the debtor's wages or co-signer's assets. Probably of even greater importance is the psychological assistance which the knowledge of these creditors' remedies give to a creditor in persuading a delinquent debtor to continue making payments on his loan, instead of using his funds for other purposes, and thereby preventing the loan from ever reaching the point of actual default.

To the extent the knowledge of the existence of these creditors' remedies keeps a debtor from ever becoming seriously delinquent, time and expense in the form of processing costs are saved. To the extent that knowledge of these remedies induces a debtor to pay his debt, even belatedly, the need for repossession or garnishment is reduced. And to the extent these remedies reduce the final loss incurred, the overall expense of the creditor's loan programs is reduced.

An extensive study of the relationship between income and costs in the field of consumer lending, and

its effects on consumers, particularly the marginal consumer, was made at the Graduate School of Business Administration of the University of Washington. This study was reported at length in *The Impact of a Consumer Credit Interest Limitation Law—Washington State: Initiative 245*.

Initiative 245, approved in the State of Washington in 1968, reduced from 18 percent to 12 percent the interest rates on various kinds of consumer credit, particularly bank cards (the 36 percent interest rate for loans under \$300 and 18 percent rate for loans from \$300 to \$500 permitted to small loan companies were not affected). The study reached three conclusions. *First*, the availability of credit was reduced in many cases—lenders' rejection rates rose, applicants were rejected who previously would have been accepted, applicants who were accepted were given lower credit lines, and other applicants were asked to get outside financing for their purchases. *Second*, the price of credit was increased for some consumers—applicants who formerly got 18 percent bank credit were forced to borrow at small loan companies at 36 percent (up to \$300) or to go to usurious money lenders at unlimited illegal rates, interest-free open book accounts were changed to interest-bearing revolving credit accounts, and downpayments were increased and maturities decreased in order to lower the risks. *Third*, the prices of products were increased—in some cases the prices of all products, in other cases the prices of credit-sensitive items, and in some cases fees were charged for services formerly rendered without cost.

This study shows the results of a reduction in a lender's income resulting from lowered interest rates. An increase in a lender's costs (higher losses and higher

collection costs, resulting from less effective creditors' remedies) would impose the same pressure on a lender and could be expected to produce the same results.

Further studies in the field of consumer credit, including a survey of the effect of changes in creditors' remedies on the cost and availability of credit, are being made by the National Commission on Consumer Finance, established by Title IV of the Consumer Credit Protection Act. In its report on its current study projects (a copy is attached to this brief as Appendix A), the Commission told about its outline of a survey on creditors' remedies and continued:

"The Commission expects responses to this outline to help it gauge the possible effect upon the credit granting industry if certain practices or laws were abolished or changed. For example, would abolishing the holder-in-due-course defense make credit less available or more costly? Would it exclude low income consumers from the legitimate credit market? Would it change credit granting criteria and cut off credit to a segment of the population, other than low income consumers, to which it is presently available?

"The Commission believes that it is breaking new ground with this study since to its knowledge no analyses have previously been undertaken to determine what occurs when laws restricting debt collection methods have been enacted."

THE HOME MORTGAGE INDUSTRY

One of the major forms of debt incurred by consumers is the mortgage debt incurred for purchase of their homes. This specialized form of consumer debt, like other consumer debt, has grown rapidly since the end of World War II. It represents, usually, the largest single debt incurred by the consumer during his life-

time, and the aggregate of mortgage debt is of vast importance to home owners generally, to land developers, to the building materials and home building industries, to the building trades, to those financial industries which participate in it, and to the public generally. The growth of mortgage debt, which parallels closely the growth of the home building industry and the supply of homes in the country, is shown by the following table:

Table 10

MORTGAGE LOANS OUTSTANDING ON ONE- TO FOUR-FAMILY
NONFARM HOMES, BY TYPE OF LENDER

(Millions of Dollars)

Year-End	Total	Savings and Loan Associations†	Commercial Banks	Mutual Savings Banks	Life Insurance Companies	Federal Government Agencies	Individuals and Others
1950	\$ 45,170	\$ 13,116	\$ 9,481	\$ 4,312	\$ 8,478	\$ 1,468	\$ 8,315
1955	88,250	30,001	15,075	11,100	17,661	3,015	11,398
1960	141,287	55,386	19,242	18,369	24,879	7,136	16,275
1961	152,994	62,395	20,038	20,022	25,641	7,310	17,588
1962	166,482	69,761	22,129	22,149	26,374	7,359	18,710
1963	182,187	79,058	24,910	24,717	27,331	6,169	20,002
1964	197,577	87,172	27,220	27,394	28,525	6,001	21,265
1965	212,937	94,225	30,401	30,064	29,589	6,396	22,262
1966	223,645	97,423	32,803	31,673	30,233	8,876	22,637
1967	236,060	103,327	35,275	33,467	29,763	10,730	23,498
1968	251,241	110,295	38,765	35,047	29,030	13,200	24,904
1969	266,823	117,990	41,356	36,443	27,964	17,062	26,008
1970	279,739	125,268	42,354	37,504	26,581	21,201	26,831

† Beginning in 1966, includes real estate sold on contract; 1967 and 1968 data exclude mortgage holdings of several associations in liquidation.

Source: Federal Home Loan Bank Board. See FHLBB Journal, Oct. 1971, p. 39.

CURRENT LEGISLATION

The consumer lending business, including mortgage lending, involves a closely interrelated series of rights and obligations which cannot be treated in isolation. Eligibility of borrowers, interest rates, security requirements, collection practices—all constitute a single integrated structure, and any change in one element may make it desirable or essential to make compensating changes in other elements.

The banking industry is convinced that a desirable balance between the interests of borrowers and of lenders can be achieved and maintained better through the legislative process than through litigation based on broad constitutional principles, which may not be susceptible of flexible application to particular circumstances, and which, in any event, cannot affirmatively amend statutory provisions so as to compensate for changes made in related statutes by judicial interpretation or invalidation.

A legislature can develop all the facts needed to reach a sound balance of the competing pressures and interests. A legislature can also change statutory benefits and burdens in various elements of the consumer lending structure to accommodate the changes it makes in other elements in the structure. A court cannot amend usury statutes and change maximum interest rates as the Uniform Consumer Credit Code would do; a court cannot amend the National Bank Act and increase or decrease the proportion of the appraised value of a house that a national bank may lend to the purchaser of the house; a court cannot increase or decrease the amounts small loan companies, credit unions, savings institutions, or commercial banks may lend on a consumer or mortgage loan.

The Congress and state legislatures have felt the need for action in this field.

During 1969 and 1970 hundreds of statutes were enacted by state legislatures affecting creditors' remedies and debtors' rights. Six states have enacted the Uniform Consumer Credit Code with more or less extensive amendments.¹⁵ Many states have also established special committees or commissions to study these issues and to make recommendations to their state legislatures.

The principal Federal statute in the field is the Consumer Credit Protection Act (82 Stat. 146, 15 U.S.C. 1601), enacted May 29, 1968, after a series of extensive hearings beginning in 1960. Title I of this act, the Truth in Lending Act, provided for consumer credit cost disclosure; Title II prohibited extortionate credit transactions; Title III contained restrictions on the garnishment of wages and salaries; and Title IV created a National Commission on Consumer Finance.

In 1970, additional consumer legislation was enacted—the Fair Credit Reporting Act (Title V, P.L. 91-508), and a prohibition on distribution of unsolicited credit cards and other credit card provisions (Title V, P.L. 91-508).

In 1971, a new bill involving many consumer credit proposals in the field of credit cards was introduced (S. 652, 91st Congress) and hearings were held on it this past week.

¹⁵ Colorado: Rev. Stat. § 73-1-101 (1971); Idaho: Laws 1971, Ch. 299 (effective July 1, 1971); Indiana: Code of 1971 § 19-21-101 (1971); Oklahoma: Laws 1969, Title 14A, § 1-101 (1969); Utah: Code Annotated, Ch. 9 (1953); Wyoming: Code Annotated § 40-1-101 to 40-9-103 (1971).

NATIONAL COMMISSION ON CONSUMER FINANCE

One of the major provisions of the Consumer Credit Protection Act was Title IV, which created the National Commission on Consumer Finance. This Commission consists of three members of the U.S. Senate, three members of the U.S. House of Representatives, and three private citizens appointed by the President. The Commission was directed to "study and appraise the functioning and structure of the consumer finance industry, as well as consumer credit transactions generally". The Commission was particularly charged with the duty of studying:

- "(1) The adequacy of existing arrangements to provide consumer credit at reasonable rates.
- "(2) The adequacy of existing supervisory and regulatory mechanisms to protect the public from unfair practices, and insure the informed use of consumer credit.
- "(3) The desirability of Federal chartering of consumer finance companies, or other Federal regulatory measures."

The Commission was required to report by January 1, 1971, later extended to July 1, 1972 (P.L. 91-344).

The Commission has undertaken an extensive research program, which was set forth in its release of March 18, 1971, a copy of which is attached as Appendix A.

As part of its program, the Commission recently prepared and sent to thousands of credit grantors, including over 1,200 commercial banks, questionnaires on "Consumer Credit Collection Practices and Cred-

itors' Remedies". (Extracts from the questionnaire sent to commercial banks were attached to the American Bankers Association's Motion for Leave to File this brief, as Exhibit B.) The aims of the Commission in making this survey were stated by the Commission's Executive Director, Mr. Robert L. Meade, as follows:

"In view of the Commission's desire to appraise objectively and completely all relevant information, the questionnaire has been designed with three aims. *First*, to enable the Commission to understand thoroughly the normal business practices utilized in collecting debts. *Secondly*, to permit the Commission to establish the extent and frequency of use of certain collection practices. *Third*, to ask your assistance in relating to the Commission the experience of your institution in a state or states whose laws either prohibit or restrict certain contractual terms relating to creditors' remedies and collection practices generally, in order that the Commission may ascertain what actual effects, if any, may be expected in the future if such limitations were adopted more widely."

The Congress authorized the National Commission on Consumer Finance to obtain information relating to consumer credit transactions, through this and other studies, in order to get information for the use of Congress in further legislation in this field. It is respectfully submitted that the same kind of information is at least appropriate if not indispensable before broad or radical changes in the consumer mortgage field are made by judicial action.

A R G U M E N T

I

The waiver of notice permitted under the Pennsylvania confession of judgment procedure satisfies the constitutional due process requirements when entered into "intentionally, understandingly, and voluntarily"

The Pennsylvania procedures for the entry of judgment on the basis of a confession of judgment clause and for execution on real or personal property on the basis of such judgment require that the debtor be given notice before his property, real or personal, is taken. These procedures are set forth fully in the briefs of the Pennsylvania Bankers Association, the Pennsylvania Credit Union League, and the Pennsylvania Savings and Loan League and no purpose would be served by repeating them here.

The requirement of the 14th Amendment to the Constitution that no person shall be deprived of his property, without due process of law, is satisfied when a person is given a reasonable opportunity for a meaningful and effective hearing as to his rights before his property is taken. This broad constitutional requirement has not been interpreted to require any specific form of hearing at any specific time in the course of the legal proceedings. It is enough if the substance of the benefits of the constitutional provision are given to the debtor. *Boddie v. Connecticut*, 401 U.S. 371 (1971); *American Surety Company v. Baldwin*, 287 U.S. 156, 168 (1932). While the entry of a judgment by confession places a lien, not wholly unlike a mortgage lien, on a debtor's property, real or personal, it does not in itself deprive the debtor of the property. In any event, only ordinary real or personal property is involved, not personal life or liberty as in a criminal case, or family

relationships, *Armstrong v. Manzo*, 380 U.S. 545 (1965), or wages—that “specialized type of property presenting distinct problems in our economic system”, *Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969). These personal rights, including a person’s rights to his wages, may well call for a higher degree of constitutional protection than the property rights involved in the present case.

II

Any ruling in this case which invalidates the Pennsylvania confession of judgment procedure or establishes procedures related thereto should be given only prospective effect and should not apply retroactively

The authority of this Court to refuse retroactive application of its basic constitutional decisions is clearly established. *Johnson v. State of New Jersey*, 384 U.S. 719 (1966); *Cipriano v. City of Houma*, 395 U.S. 701 (1969).

The catastrophic results of retroactive invalidations of judgments already entered on the basis of confession of judgment clauses, particularly judgments relating to real estate, and the history and development of the authority of this Court to issue rulings with prospective effect only, are fully set forth in the *amicus* brief of the Pennsylvania Land & Title Association.

While the authority of this Court to decree that any of its rulings may be given prospective effect only has been clearly established, the inclusion of such limitations in its decisions indicates that the Court is aware of the quasi-legislative nature of such rulings. It is respectfully submitted that cases of this nature are particularly appropriate for the exercise of judicial restraint.

III

No substantial evidence was introduced indicating any need for the establishment of a procedure in cases involving real estate mortgages to determine whether confession of judgment clauses in such mortgages were entered into "intentionally, understandingly, and voluntarily"

The evidence introduced in the case, largely confined to hearsay evidence, to the effect that debtors who signed contracts which contained confession of judgment clauses did not understand what they were signing, was limited almost entirely to persons who had executed notes or other instruments relating to loans on personal property, not to mortgages on real estate. What little evidence there was concerning real estate mortgages indicated that usually, if not always, mortgagors were represented at closings by lawyers or real estate brokers, who were able, and under a duty, to explain to their clients the significance of all aspects of the documents they were signing, including the confession of judgment clauses.

The mortgage itself, when recorded, creates a lien on the real estate covered, and entry of the judgment only creates a different kind of lien. Neither lien itself deprives the mortgagor of title to, or possession of, his property. Notice to the mortgagor is required after entry of the judgment and before the Sheriff's Sale that deprives him of his property.

The distinctions between the procedures relating to real estate mortgages in Pennsylvania and the procedures relating to other types of credit are set forth in the brief of *amicus* Pennsylvania Savings & Loan League. In the light of the very different circumstances surrounding the drawing up and execution of a mortgage, and the different procedures concerning

the use of confession of judgment in mortgage cases it is respectfully submitted that evidence relating to the borrowing of money or the purchase of household goods or automobiles by individuals is not relevant to or controlling on transactions involving mortgages.

IV

This Court's stay prohibiting execution under any judgment based on an instrument containing a confession of judgment clause, even though the procedure was not used, was unreasonable and should be terminated.

The Court's stay, issued April 21, 1971, prohibited execution on or sale of real or personal property under any judgment based on an instrument containing a waiver of notice and other rights under the Pennsylvania confession of judgment procedure, even though the judgment in question was not obtained by means of the confession of judgment procedure, but through adversary proceedings. This stay apparently is based on the theory that the confession of judgment clause is so inherently vicious that its inclusion in a contract vitiates the contract whether or not it is used.

It is respectfully submitted that even if the confession of judgment procedure is found to be unconstitutional, this stay is unnecessary and inappropriate. If a creditor has for one reason or another given the debtor the benefit of an opportunity to try his case in open court or through adversary summary judgment proceedings, there would seem to be no reason why the obligation found due from the defendant after full adversary proceedings providing all the benefits of due process should be nullified. In fact it does not appear that the appellants seek continuance of this provision.

The effect of such a rule on mortgages and other obligations in Pennsylvania or elsewhere might well have many of the same catastrophic results as are indicated in point III above.

V

Any decision reached by this Court should be restricted to the specific situation before the Court and should not undertake to review and pass upon confession of judgment procedures under California statutes or elsewhere on a nationwide basis.

The brief submitted by *amici curiae* California Rural Legal Assistance, et al., cites California statutes and sets forth in detail the legal proceedings relating to two individual *amici curiae*. It appears from references throughout that brief that when these *amici* urge that the judgment of the District Court be reversed, they do so for the purpose of invalidating the California confession of judgment statutes as applied to them, as well as the Pennsylvania confession of judgment procedures as applied to the appellants in this case.

The brief of *amicus curiae* National Consumer Law Center also relies on "its experience on a nationwide basis" and likewise urges that "the deprivation of property by means of confessed judgment is contrary to the public policy of the United States and is unconstitutional". There is no indication that this position is taken otherwise than "on a nationwide basis".

It is respectfully submitted that the Court should refrain from undertaking in this case to pass on the validity of the California confession of judgment procedure which appears to differ substantially from that

of Pennsylvania¹⁶ or on the validity of so-called confession of judgment procedures in Delaware,¹⁷ Ohio,¹⁸ Illinois, Virginia and Wisconsin, all of which also appear to differ substantially in one respect or another from the Pennsylvania procedure.¹⁹ Any decision applicable to other states than Pennsylvania, or to creditors' remedies generally, should be based upon a specific case or controversy involving an actual dispute between parties with differing interests, subject to full adversary briefing and argument by competent counsel representing interested parties affected by the laws of those states, not on the basis of the unverified allegations set forth in the brief of the California amici or the "nationwide experience" of *amicus* National Consumer Law Center.

¹⁶ California amici concede (their Brief, page 7) that the Pennsylvania type of confession of judgment clause is prohibited in California in contracts for retail instalment sales and for loans by personal property brokers and other loan companies. They point out that the California individual amici agreed to their confessions of judgment after default on the contracts involved (their Brief, page 7). By that time, of course, the debtors presumably knew of any defects in the items purchased, or of any breaches of warranty or failure to perform on the part of the vendors or creditors. And while other California creditors are not expressly prohibited from using confession of judgment clauses in their contracts, we are advised that Section 1133 of the California Code of Civil Procedure requires that a confession of judgment statement be "signed by the defendant, and verified by his oath", that this has been interpreted by the Supreme Court of California as precluding confessions of judgment executed by a person acting as the debtor's attorney, *Barnes v. Hilton*, 118 C.A. 2d 108, 257 P.2d 98 (1953), and that as a practical matter this requirement makes contractual confession of judgment clauses impractical for all creditors.

¹⁷ Being considered by this Court in *Osmond v. Spence*, October Term, 1971, No. 70-291.

¹⁸ Being considered by this Court in *Overmyer v. Frick*, October Term, 1971, No. 69-5.

¹⁹ See Commerce Clearing House, Consumer Credit Guide, Para. 610, Judgment Notes, Vol. 1, pgs. 2301-2311.

On the contrary, the clear indication that parties to this case seek to apply the ruling to be issued herein to the procedures of other states, under other conditions, should, it is respectfully submitted, lead the Court to exercise special care and special restraint in issuing its ruling in this case.

CONCLUSION

It is respectfully submitted that this Court should:

- (1) adopt the position taken by the Court below that the Pennsylvania confession of judgment procedure, when agreed to "intentionally, understandingly, and voluntarily", is not unconstitutional;
- (2) adopt the position taken by the Court below that any ruling in this case which affects or modifies the Pennsylvania confession of judgment procedure should be given prospective effect only;
- (3) adopt the position taken by the Court below that no basis exists for the application of any ruling issued in this case to real estate mortgages;
- (4) terminate and dissolve this Court's stay, issued April 21, 1971; and
- (5) confine any ruling issued in this case to the Pennsylvania confession of judgment procedure as applied to the circumstances before this Court.

Respectfully submitted,

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November 3, 1971

APPENDIX A

March 18, 1971

**Outline of Research Program
National Commission on Consumer Finance**

1. The Problem and the Study
 2. Structure of the Industry
 3. Regulatory Mechanisms
 4. Availability
 5. Reasonable Rates
 6. Disclosure
 7. Unfair Practices
 8. Effectiveness of Regulatory and Supervisory Mechanisms
 9. Information and Education
 10. Credit Insurance
 11. Federal Chartering
 12. The Future of Consumer Credit
 13. Summary—Conclusions—Recommendations.
- * * * * * * * *

**National Commission on Consumer Finance Report on Current
Study Projects**

The National Commission on Consumer Finance was directed by Congress to "study and appraise the functioning and structure of the consumer finance industry, as well as consumer credit transactions generally" and to report its findings on:

- (1) the adequacy of existing arrangements to provide consumer credit at reasonable rates;

- (2) the adequacy of existing supervisory and regulatory mechanisms to protect the public from unfair practices and to insure the informed use of consumer credit; and
- (3) the desirability of Federal chartering of consumer finance companies, or other Federal regulatory measures.

To do this adequately, the Commission developed the attached outline based on the statute to serve as a framework for its research.

Since much of the information needed for its studies has been unavailable or in unusable form, the Commission has launched several data collection projects of its own. These and other Commission studies are currently under way.

Traditionally, consumer credit legislation has focused on a specific problem with the idea of correcting a specific abuse. Repeatedly, legislation has been drafted or amended on the basis of these assumptions despite the fact that few if any facts are available on the potential effects of proposals. But this Commission, from the data it gathers, will try to assess the many variables that affect any changes in the "... functioning and structure of the consumer finance industry." Such assessments should provide a basis for legislative bodies, both state and national, to predict with better accuracy the effect on credit grantors and users of proposed laws and regulations to consumer credit. Future legislative and regulatory efforts may thus occur in a context of overall objectives sought and the predictive consequence of particular legislation on these objectives.

The complexity of the consumer finance industry is brought into sharp focus by the Commission's first area of inquiry: "the adequacy of existing arrangements to provide consumer credit at reasonable rates." It has

often been pointed out that credit laws are a patchwork of Federal and state legislation, varying from moderate to extensive state-by-state. The variations among state laws may well be a vital research tool in the Commission's study. Thus, to assess the potential impact of any change in the law on credit grantors and users, the Commission plans to determine the price and amount of credit on a state-by-state basis, including credit generated by banks, retail establishments, credit unions, and finance companies. When these data are gathered, the Commission will attempt to measure the effects of local rate ceilings; state licensing requirements that limit entry of new competition in the consumer finance market; branch banking laws and regulations; and the existence or nonexistence of certain creditor and debtor remedies on the price and amount of credit in each state. To complete this analysis, the Commission will also analyze the statutes and available administrative and case law of each state to determine:

- (1) the rate ceilings for each category of credit (i.e., small loans, retail installments sales, etc.) in each state;
- (2) the existence or nonexistence of convenience and advantage statutes in each state and whether such statutes are, in fact, barriers to creditor entry in the small credit market;
- (3) the existence or nonexistence of branch banking provisions and whether these provisions are barriers to entry; and
- (4) which creditor and/or debtor remedies are permitted in each state and how these remedies affect the availability of consumer credit.

To put these data in perspective as well as to fulfill its Congressional mandate, the Commission must also try to determine which segment of the community cannot obtain credit at existing rates and why. After these

data have been gathered and analyzed, the Commission can begin to assess the adequacy of available consumer credit at reasonable rates.

The following is a listing, together with a brief description, of Commission research projects now in progress. Neither the descriptions nor the order are indicative of the relative importance of the studies.

The Commission is conducting a study of the pricing process in the consumer credit industry to try to assess the effect of state laws, government regulation, market structure and demographic and other factors on the price and availability of consumer credit. The survey will collect data on a state-by-state basis (probably using the fourth calendar quarter of 1970) for (1) the total amount of consumer installment credit extended and outstanding, and (2) the average price of such credit. This is the first time that any agency—public or private—has collected finance rate data on a national or state basis for each category of consumer installment credit and the first time that extensions and outstandings have been collected on a state-by-state basis.

This project will enable the Commission to analyze differences in the price and availability of consumer installment credit as they relate to differing state laws (i.e., analysis of the effects of rate ceilings, restrictions on entry, etc.). It will also be available as the Commission attempts to appraise "the functioning and structure of the consumer finance industry" and "the adequacy of existing arrangements to provide consumer credit at reasonable rates." This study should give the Commission insight as to the desirability of Federal chartering.

Another area of Commission research concerns creditors' remedies. During the Commission hearing

in June 1970, several witnesses representing consumer interests recommended curtailment or abolishment of certain collection practices, creditors' remedies, and contractual provisions. To prepare for a possible hearing at which credit industry representatives could discuss these proposals, Commission staff designed a comprehensive data-gathering outline to be completed by a sample of credit grantors representing the existing categories of consumer credit. Basically, the outline was prepared to help the Commission understand practices normally used in debt collection; to compile data establishing the extent and frequency of the use of such practices; and to document the experience of various credit grantors in states which have either abolished or restricted certain creditors' remedies, collection practices or contractual provisions.

The Commission expects responses to this outline to help it gauge the possible effect upon the credit granting industry if certain practices or laws were abolished or changed. For example, would abolishing the holder-in-due-course defense make credit less available or more costly? Would it exclude low income consumers from the legitimate credit market? Would it change credit granting criteria and cut off credit to a segment of the population, other than low income consumers, to which it is presently available?

The Commission believes that it is breaking new ground with this study since to its knowledge no analyses have previously been undertaken to determine what occurs when laws restricting debt collection methods have been enacted.

Another offshoot of the June hearings is a study of automobile repossessions in the District of Columbia. This project was designed to determine the number of repossessions, the nature of repossession

practices, and the effects of repossession—particularly deficiency judgments. Staff researchers were able to trace records of 106 automobiles through court and Motor Vehicle Department files from first financing through repossession, wholesale resale (which establishes the deficiency) and the ultimate retail resale. In each case, actual sale price and NADA Guidebook wholesale and retail values were recorded and the results are now being tabulated for study. The Commission hopes that a comparison of these values will indicate whether “commercially reasonable sales” have taken place. These data, plus data derived from FTC studies designed from the Commission’s automobile repossession study format and now being completed in several U. S. cities, should provide information indicating if alternative approaches to the repossession-deficiency process should be considered.

The Commission staff is closely analyzing the Federal Reserve Awareness studies of 1969 and 1970 to assess more specifically the effects of the Truth in Lending legislation on the public. A questionnaire was designed and sent for completion to the nine agencies charged with enforcing Title I of the Consumer Credit Protection Act. Results of this questionnaire should assist in further assessment of the effectiveness of Truth in Lending, as well as the effectiveness of the enforcement activities of the nine agencies.

The Commission has contracted for a study in California of awareness, attitudes, and use of credit by all income groups and by a special sample of low income blacks. This study will attempt to relate the consumers’ awareness of finance charges and rates to the decision to purchase goods on a cash or credit basis. It will also determine if consumers consider planning, comparison shopping and present credit ob-

ligations in making their purchasing decisions. Data obtained from this research will be compared with the Federal Reserve Awareness study of December 1970 and with a similar study completed by a Stanford doctoral student in June 1969.

The California study and Commission staff analysis of the Federal Reserve survey should help the Commission decide whether "existing regulatory and supervisory mechanisms . . . insure the informed use of consumer credit," and whether educational and counseling programs are needed to supplement Truth in Lending.

The Commission has contracted to develop a credit-scoring system for lenders who extend credit to low income borrowers. Currently used systems for screening credit applicants seem to lack the kind of criteria that might provide creditors with information to make better judgments between "good" and "bad" credit risks at the low income level. This project may enable the Commission to assess how much the limitations of present systems restrict credit and to suggest recommendations concerning the design of credit-scoring systems to accommodate more fairly and accurately the low income segments of our population. This study partially answers questions concerning the "adequacy of existing arrangements to provide consumer credit at reasonable rates."

In a related area, the Commission has contracted to analyze the debt position of families in poverty areas. This study is intended to help ascertain whether poverty neighborhood consumers whose income, stability of income, and the liquid assets resemble non-poverty area residents can get credit as readily in the same amounts as their nonpoverty area counterparts. It will also explore the possibility of variances

in the availability of credit as between racial groups in the poverty and nonpoverty areas.

The Commission has initiated a pilot study to determine what happens to applicants rejected for retail credit by large retailers. This study should provide some indication of the extent to which the consumer's basic need for retail credit was genuine in the sense that his drive for purchase was strong enough to motivate him to search for other sources of credit. The study should also disclose what other sources of credit were approached and the socio-economic characteristics of consumers denied credit by other such retailers.

The Commission is currently attempting to compile and evaluate experimental credit granting programs now in operation in the United States. Sources of credit for these programs include low income credit unions, banks and retail merchants. The Commission is also compiling and evaluating credit counseling and educational programs.

The Commission has queried all state and local bar groups as to their views and activities regarding various debt collection practices. Responses are currently being examined.

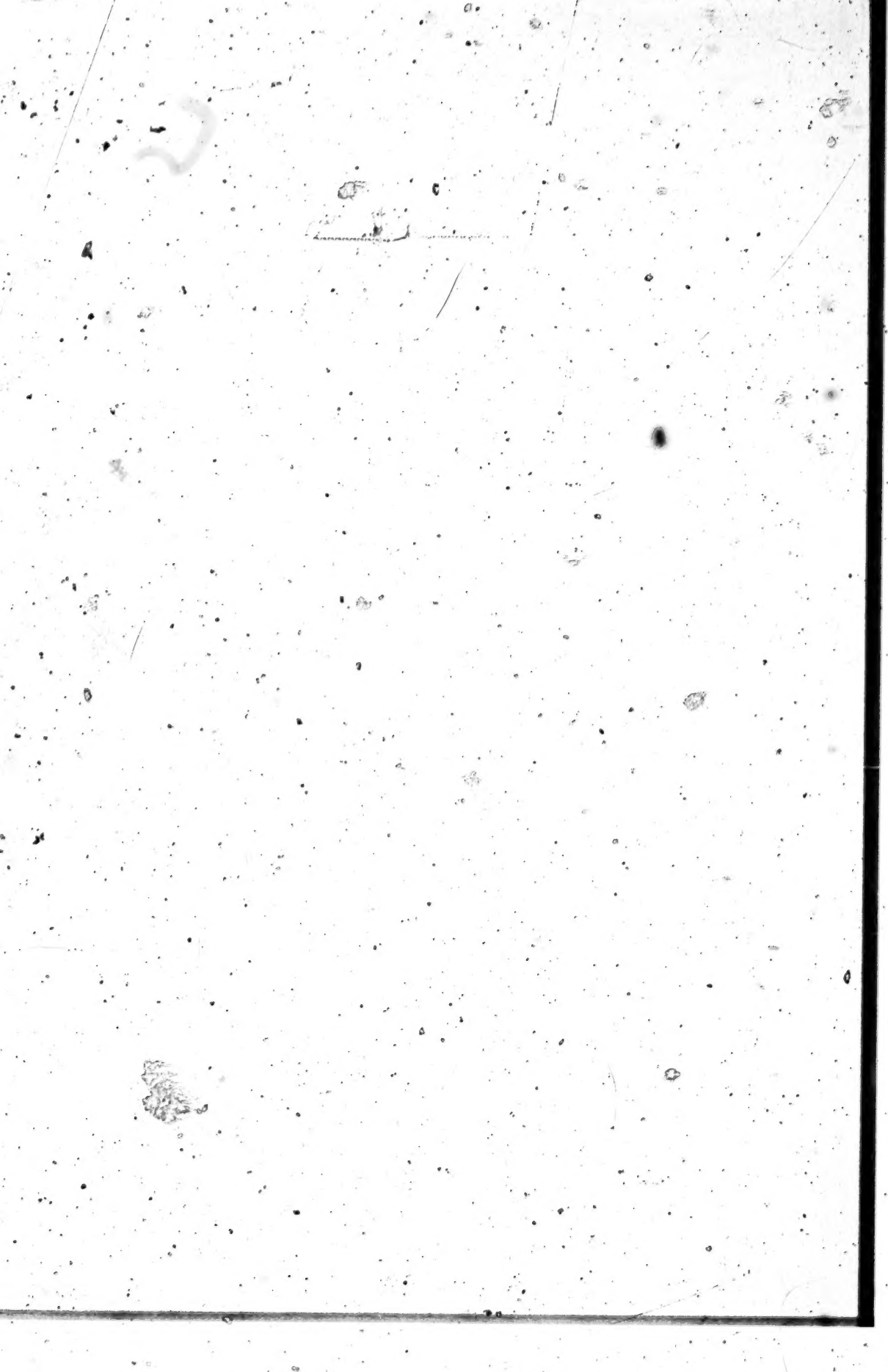
Other projects in preliminary stages are:

- A study of the cost structure of consumer finance companies and the retail industry.

- A study of how low rate ceilings on credit affect the price of retail goods.

- A theoretical study of imperfections and competition in consumer credit markets.

- A history of rate making and regulation.



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IN THE

Supreme Court of the United States

October Term, 1971.

No. 70-6.

NELLIE SWARB, et al.,

Appellants,

v.

WILLIAM M. LENNOX, et al.,

Appellees.

On Appeal From the United States District Court for the
Eastern District of Pennsylvania.

BRIEF OF THE PENNSYLVANIA BANKERS ASSOCIATION AS AMICUS CURIAE.

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INTEREST OF *AMICUS CURIAE*, PENNSYLVANIA BANKERS ASSOCIATION

The Pennsylvania Bankers Association (P. B. A.) files this brief *amicus curiae* in opposition¹ to the claim that procedures available in the State courts of Pennsylvania for the entry of record of a money judgment on the

1. The following have appeared in this matter either nominally or as *amicus curiae* on the appellees' side of the case:

(a) The named defendants in the court below, the Prothonotary and Sheriff of Philadelphia County, take no position on the merits.

(b) The Attorney General of Pennsylvania, who is given standing in the case for the purpose of defending the Constitutionality of state statutes, has filed a brief which joins the appellants in seeking to have the procedures involved declared unconstitutional on their face. This position of the Attorney General should be considered in the light of the conduct on the part of personnel of the Pennsylvania Department of Justice who have participated in this case in this Court in the name of the Attorney General as appellee after having participated in the case as attorneys for the appellant both in the lower court and in this Court. See Motion of P. B. A. for leave to file brief as *amicus curiae* filed June 18, 1971.

(c) The intervenor defendants who participated in the case in the lower court are not participating in this appeal. However, counsel who represented them but who are not now representing any client have filed a brief in which it is stated (at page 3) that "the principal function of this Brief will be to demonstrate how the District Court's objections to the existing confession of judgment procedure can be obviated."

(d) Pennsylvania Land Title Association has filed a brief *amicus curiae* solely on the question whether any decision as to unconstitutionality should be made prospective only.

(e) The Pennsylvania Credit Union League has filed a brief *amicus curiae* in which the argument is based on the "primary interest of the League . . . in a security device" and "the execution aspects of the challenged Pennsylvania statutes and procedures are a secondary consideration with the League." (at pages 6-7).

(f) The Pennsylvania Savings and Loan League has filed a brief *amicus curiae* which states that it is seeking to sustain the practice of using confession of judgment clauses in bond and mortgage transactions (at page 2). The brief is based on the position that the "situation of these savings and loan associations is quite different from that of other creditors using confession

authority of a written agreement of a debtor are invalid under the Federal Constitution. P. B. A. also submits that the federal courts should withhold any decision on the question pending action concerning the matter by the Supreme Court of Pennsylvania.

P. B. A. is an association of more than 450 commercial banks located in Pennsylvania. Its members in their business engage extensively in the granting of loans and other credit to individuals, partnerships and corporations upon the security of "judgment notes" and other instruments and contracts which authorize the holder to have a judgment entered of record upon the written agreement of a borrower or debtor.

The appeal before this Court questions the constitutionality of procedures in the courts of Pennsylvania which permit such judgments subject to Rules of Civil Procedure adopted by the Supreme Court of Pennsylvania. If the appeal should be upheld by this Court in whole or part, credit and loan practices of the members of P. B. A. would be adversely affected with the expected consequence that credit availability would be lessened for those who may deal with members of P. B. A. In addition, the basis for such a ruling could draw into question the validity of other

of judgment," (at page 3). P. B. A. argues for the constitutionality of the judgment procedure without distinction as to type of creditor or type of credit.

(g) The American Bankers Association has been granted leave to file a brief *amicus curiae* on the basis of a motion that stated its brief would be principally "in opposition to proposals to extend the scope of the decision in this case beyond the rulings of the District Court. (Motion, p. 10.) The American Bankers Association has advised P. B. A. that it supports P. B. A.'s major positions and will adopt by reference to P. B. A.'s brief many of the arguments that P. B. A. advances.

Accordingly, P. B. A. is the only active participant in this appeal which is taking a position in complete opposition to the decision of the lower court and the contentions of appellants and is the only participant arguing the question in point II of this brief.

established practices not related to judgment notes since members of P. B. A. and other credit extenders often obtain collateral for loan and credit transactions through mortgages of real estate, pledges of stocks and bonds and security interests in automobiles and other personal property which allow retaking and sale of specific property upon default.

The interest of credit extenders in available methods of obtaining security is reciprocal with the interest of borrowers and other users of credit since the provision of security is often a factor or the determinant in a decision to grant credit. The entry of judgment on the basis of the agreement of a borrower is a traditional method of obtaining such security in Pennsylvania since a judgment of record, even when entered prior to default, is a lien on interests in real estate owned by the debtor in the county where the judgment is entered.

There are several reasons why a judgment note or similar agreement is used in practice by banks rather than a real estate mortgage. Banking laws and regulations restrict the use of real estate mortgages as security for loans. The judgment note is also simpler and less expensive as to form, content, execution, recording in a public office and termination of such recording on payment. It is also less definitive as to the creation of a lien against the customer since many judgment notes and agreements are never entered of record but are merely held while the loan or credit is outstanding with the possibility of subsequently entering them in the event of a change in the credit condition of the customer. Mortgages, on the other hand, are typically entered of record promptly because of possible legal effects that could arise from delay in recording. All of these reasons resulted in the traditional practice among banks in Pennsylvania to make use of judgment notes notwithstanding the better security of mortgage liens. See footnote 8 at page 22.

SUMMARY OF ARGUMENT.

The court below ruled that, prospectively after the effective date of its order, procedures in Pennsylvania for entry of judgments on the written authority of debtors would be unconstitutional as applied to debtors with an income of less than \$10,000 a year in cases of consumer credit other than mortgages unless it were shown that the debtors "intentionally, understandingly, and voluntarily waived all the rights lost under Pennsylvania law." *Swarb v. Lennox*, 314 F. Supp. 1091, 1103 (E. D. Pa. 1970). Appellants claim that such procedures for entry of judgment by agreement are unconstitutional on their face and seek reversal of the court below to the extent its ruling was limited to particular classes of cases. P. B. A. claims first, that the Pennsylvania procedures are constitutional and second, that the federal courts should abstain from ruling on the constitutional question until the Pennsylvania Supreme Court has ruled on the attack directed at its own rules.

I.

The lower court's perception of the practical and legal effects of the procedures for entry of judgment by virtue of a debtor's agreement was incomplete and inaccurate and on the basis of this wrong understanding of State procedures the lower court drew insupportable inferences of constitutional effects. The State procedures in question fully comply with the requirements of Due Process and the procedures are adequately supervised and controlled by the Pennsylvania courts.

II.

In the alternative, the federal courts should apply the abstention doctrine to withhold any ruling on the constitu-

tional issue until the Supreme Court of Pennsylvania has considered the issue at hand not only because of the general considerations of Federal-State relationships that are the essence of the abstention doctrine but also because of the special role of the Pennsylvania Supreme Court under the State Constitution with respect to the court procedures involved.

Argument.

I. THE PENNSYLVANIA JUDGMENT PROCEDURES ARE CONSTITUTIONAL.

A. The Pennsylvania Judgment Procedures in Question Are Common Law Court Procedures Over Which the Courts of Pennsylvania Exercise Proper Supervision and Control.

The procedures for entry of judgment on the basis of agreement have been used¹ in the courts of Pennsylvania throughout its history² and trace their origin to the English common law and practice.³ Marks of this history are found in the expressions "confession of judgment," "cognovit"

2. *Barde v. Wilson*, 3 Yeates 149, 150 (1801). In *Kirkbride v. Durden*, 1 Dall. 288 (1788) the argument of counsel refers to the judgment practice as "old and constant practice in Pennsylvania both before and since the revolution." *Id.* at 290. The argument further states that the form of the warrant of attorney in that case is the same that has been used for more than a century past. *Id.*

3. "Blackstone in his Commentaries on the Law of England, Book III, pages 395-396, refers to four types of judgment: 'First, where the facts are confessed by the parties, and the law determined by the court; as in case of judgment upon *demurrer*: secondly, where the law is admitted by the parties and the facts disputed; as in case of judgment on a *verdict*: thirdly, where both the fact and the law arising thereon are admitted by the defendant; which is the case of judgments by *confession* or *default*: or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution; which is the case in judgments upon a *non-suit* or *retratrix*.' Blackstone further discusses confession of judgments as follows (397): '... it is very usual, in order to strengthen a creditor's security, for the debtor to execute a warrant of attorney to some attorney named by the creditor, empowering him to confess a judgment by either of the ways just now mentioned (by *nihil dicit*, *cognovit actionem*, or *non sum informatus*) in an action of debt to be brought by the creditor against the debtor for the specific sum due: which judgment, when confessed, is absolutely complete and binding . . . *Nihil dicit* is where a defendant suffers judgment to go against him by default for the reason that no plea is entered to the plaintiff's declaration.

and "warrant of attorney" still in use in connection with these procedures.

The Supreme Court of Pennsylvania has described the essence of the procedures:

"The confession of judgment is but one of the ways and processes by which a person is sued. It is a voluntary submission to the jurisdiction of the court given by consent and without the service of process." *Horner Sales Corp. v. Motor Sport Inc.*, 377 Pa. 392, 395, 105 A. 2d 285, 286 (1954).

Entry of judgment on the basis of agreement is a common law procedure which is not dependent on statute. The Act of 1806, Pa. Stat. Ann. tit. 12, § 739 (Purdon 1971), permits a prothonotary or court clerk in certain cases to enter a judgment on the basis of agreement but that statute is not exclusive:

"Independently of ~~that~~ Act, an amicable action may be entered by attorney. It has been a long and general practice." *Cook v. Gilbert*, 8 S. & R. 567, 568 (1822). See also *Kros v. Bacall Textile Corp.*, 386 Pa. 360, 364-365, 126 A. 2d 421, 424 (1956); *Noonan v. Hoff*, 350 Pa. 295, 298; 38 A. 2d 53, 55 (1944).

The essential question before this Court in this case, therefore, involves common law court procedures and not statutory remedies.

Confession or *cognovit actionem* acknowledges the plaintiff's demand to be just. *Non sum informatus* is where defendant's attorney declares he has no instruction to answer to the plaintiff or say anything in defense of his client. In reality, there was but one judgment by confession at common law and that was judgment by *cognovit actionem*. A second is sometimes said to be a judgment by confession *relicta verificatione*. See 31 Am. Jur. Judgments, Section 465; 34 Corpus Juris 97. This is, however, defined as 'a *cognovit actionem* accompanied by a withdrawal of the plea': Black's Law Dictionary." *Commonwealth v. Central R. R. Co. of N. J.*, 358 Pa. 326, 333-334, 58 A. 2d 173, 177 (1948).

As actions in the courts, these proceedings have always been subject to judicial surveillance and control. The earliest reports of Pennsylvania decisions exemplify that control: *Gerard v. Basse*, 1 Dall. 119 (1784) (judgment entered against partners on a bond held to bind only the partner who signed the bond); *Shoemaker v. Shirtliffe*, 1 Dall. 133 (1785) (execution could not be issued on a judgment entered on a bond prior to the maturity of the bond).

The standards applied by the Pennsylvania courts in granting judicial relief from judgments entered on agreement have from the earliest times been extremely liberal. In *Gerard v. Basse*, 1 Dall. 119 (1784) the test stated was whether "... there was a real *bona fide* debt due ..." and whether defendant had "... executed the bond and warrant of attorney, freely and without compulsion, and that there is no ground for setting it aside, from any unfairness in the transaction." *Id.* at 122. These standards impose broad dual tests:

the reality of the debtor's authorization for the
entry of judgment

and

the substantive justice of the enforcement of the
judgment.

The course of Pennsylvania decisions over two centuries has not departed from these tests but has reinforced them.⁴

4. Similarly strict tests have been applied in this Court when dealing with judgments entered on the basis of agreement: *Grover & Baker Sewing Machine Co. v. Radcliffe*, 137 U. S. 287 (1890) (judgment confessed in Pennsylvania not enforceable in Maryland because entered by prothonotary rather than by attorney pursuant to terms of warrant); *National Exchange Bank of Tiffin v. Wiley*, 195 U. S. 257 (1904) (Ohio judgment for payee of note not enforceable in Nebraska because not entered in favor of holder of note as provided in warrant).

To test the reality of a debtor's authorization the Pennsylvania courts have required that a warrant to enter judgment be in writing, that it be "self-sustaining," that it be signed by the debtor, that the debtor be "conscious of the fact" of the warrant and that the debtor's signature bear a direct relation to the warrant so that in a "form" contract or in a multiple page contract, for example, its location and prominence must assure the debtor's awareness of its presence. See *L. B. Foster Co. v. Tri-W. Const. Co., Inc.*, 409 Pa. 318, 186 A. 2d 18 (1962); *Frantz Tractor Company v. Wyoming Valley Nursery*, 384 Pa. 213, 120 A. 2d 303 (1956); *Horner Sales Corp. v. Motor Sport Inc.*, 377 Pa. 392, 105 A. 2d 285 (1954); *Cutler Corp. v. Latshaw*, 374 Pa. 1, 97 A. 2d 234 (1953).

In applying the test of substantive justice as a criterion for judicial control of judgments based on agreement, the Pennsylvania trial courts have been directed to be "strict in passing upon the validity of judgments so entered." *Scott Factors v. Hartley*, 425 Pa. 290, 292, 228 A. 2d 887, 888 (1967). A trial judge in determining whether to grant relief from such a judgment must decide merely whether "doubt exists as to the real justice and equity of the case" and the exercise of his equitable powers will not be reversed in the absence of an abuse of discretion. *Klein v. Mathewson*, 384 Pa. 298, 302, 121 A. 2d 577, 579 (1956); *Universal B. Sup., Inc. v. Shaler H. Corp.*, 409 Pa. 334, 186 A. 2d 30 (1962). A purported waiver of the right to seek such judicial relief is disregarded since:

"... it is well established that such a waiver applies only to technical or procedural irregularities and not to substantive or fundamental questions of liability or the amount thereof." *Kros v. Bacall Textile Corp.*, 386 Pa. 360, 367, 126 A. 2d 421, 425 (1956).

Commentators have observed that in the practical application of these standards the Pennsylvania courts have been liberal in setting aside or opening judgments entered by agreement to permit defenses to be raised. Toomepuu, *Cognovit Judgments and the Full Faith and Credit Clause*, 50 BOSTON U. L. REV. 330, 337 (1970).

The common law control of the courts over judgments entered on the basis of agreement has been expanded in Pennsylvania by the special authority over all court procedures in civil actions given to its Supreme Court. As amended by the people in 1968, the Pennsylvania Constitution in Art. V, § 10(c) ordains:

"The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and to practice law, and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions."

This provision confers on the Pennsylvania Supreme Court authority to promulgate rules for procedure in the

State courts which supersedes the power of the Pennsylvania General Assembly to govern the same subject by statute. Accordingly, the question before the Court in this case involves not only a matter of court procedures, as noted above, but also a question of procedure within the ultimate control of the State's highest court rather than its legislature.

B. The Pennsylvania Judgment Procedures Provide Notice and Opportunity for Hearing Substantially the Same as the Pennsylvania Assumpsit Procedures in Compliance With Due Process Requirements.

Article V, Section 10(c) of the Pennsylvania Constitution enlarged the limited power which the Pennsylvania Supreme Court formerly had by statute to adopt procedural rules for civil actions. Pa. Stat. Ann. tit. 17, § 61 (Purdon 1962). By that authority and currently by virtue of the Constitutional provision, the Pennsylvania Supreme Court has adopted rules for "Confession of Judgment for Money", Pa. R. C. P. 2950 et seq., Pa. Stat. Ann. tit. 12 (Purdon Supp. 1971) and rules for "Action in Assumpsit", Pa. R. C. P. 1001 et seq., Pa. Stat. Ann. tit. 12 (Purdon 1971) which is the ordinary form of contract action including action on debt.

An understanding of the similarity of the two procedures is needed in order to resolve the question of whether there is a Due Process deficiency in the Pennsylvania procedure for the entry of a judgment with a debtor's agreement. This is particularly true since the court below correctly accepted the propriety of the procedural rules for assumpsit but incorrectly understood the confession of judgment rules and believed them to be so different from the assumpsit rules as to be constitutionally deficient.

The case that is the one with which members of P. B. A. would ordinarily be concerned is a loan evidenced by an obligation which authorizes entry of judgment. The following is a summary of the steps required in each such case before the debt could be collected through sale of the debtor's real or personal property.

In an action of assumpsit the creditor would have to file a written statement of the cause of action ("complaint") normally with a copy of the debtor's note attached and a verification of the statements made by oath or affirmation (Pa. R. C. P. 1019 and 1024). Service on the debtor is required (Pa. R. C. P. 1009 and 1027). The debtor has a 20 day period for filing a responsive pleading (Pa. R. C. P. 1026). A denial by the debtor of the existence of the obligation or other essential stated in the complaint would have to be made specifically (Pa. R. C. P. 1029 (b)). In the absence of such a specific denial or an affirmative defense the plaintiff may move immediately for judgment upon default or admission (Pa. R. C. P. 1037), for judgment on the pleadings (Pa. R. C. P. 1034) or for summary judgment (Pa. R. C. P. 1035). An affirmative defense of the debtor, including payment of the obligation, would have to be set forth in "new matter" or as a counterclaim (Pa. R. C. P. 1030 and 1031). Any pleading of the debtor would have to be verified (Pa. R. C. P. 1024). In the event an issue of fact is raised by the pleadings, the parties may take depositions and engage in discovery (Pa. R. C. P. 4001 et seq.). The depositions and discovery may be used as the basis for a motion for summary judgment (Pa. R. C. P. 1035). The matter proceeds to trial only if there is a "genuine issue of material fact."

In an action to enter a judgment by confession the creditor must file a verified statement ("complaint") normally with a copy of the debtor's note attached (Pa.

R. C. P. 2951), unless the prothonotary may enter the judgment under the Act of 1806 (Pa. R. C. P. 2951). The latter procedure requires production of the note to the prothonotary and the amount due must appear from the face of the instrument; the procedure may not be used if the entry of judgment requires the occurrence of a default or condition precedent which cannot be determined from the face of the instrument (Pa. R. C. P. 2951(e)). Whichever method of entry of judgment is used, the plaintiff must, under requirements that may not be waived, mail notice of the entry to the defendant and file with the prothonotary an affidavit of the mailing of the notice and no execution may be proceeded with until 20 days after the notice has been mailed and the affidavit has been filed (Pa. R. C. P. 2958). Although the same rule permits a writ of execution to be issued within the first 20 days after the entry of the judgment (for the purpose of obtaining priority of lien on personal property), it may not be proceeded with so that no sale of the debtor's property could even be scheduled until after the 20 day period following the required notice and affidavit; no execution may be issued within that notice period in any other case. Defendant may seek relief from the judgment by a petition (verified under Pa. R. C. P. 206) to strike or to open it which may be filed at any time; the court is required to issue a rule to show cause if the petition states prima facie grounds for relief and may stay the proceedings; disposition of that rule may be made on the pleadings, testimony, depositions, admissions and other evidence (Pa. R. C. P. 2959).

This comparison of the assumpsit action and the judgment action shows there is simply no foundation for appellants' arguments that the judgment procedure deprives a debtor of "notice and an opportunity to be heard before he may be deprived of any property" or that it is "a denial

of access to the Courts''. Brief of Appellants at pp. 9 and 26. In both the assumpsit and judgment procedures there are mandatory notice⁵ requirements and a minimum 20 day period before action to take property from a debtor through sale on execution⁶ and in both there is an identical opportunity to seek a ruling by a court on claims of the debtor supported merely by verified statement that will entitle the debtor to have a trial.

C. The Court Below Misinterpreted the Law and Did Not Understand the Pennsylvania Practice With Respect to the Judgment Procedures in Question Causing It to Err in Its Decision With Respect to Due Process.

The court below, without specific reference to the Rules of Civil Procedure summarized above, expressed several

5. As to judgments entered on the basis of agreement there are additional notices in some cases, over and above the notice that must be given by the agreement itself for it to be a valid one under Pennsylvania law. In any case subject to Regulation Z of the Board of Governors of the Federal Reserve System under the Truth in Lending Act, 15 U. S. C. A. § 1601, a prescribed notice must be given to a borrower who signs an agreement which may result in a lien on his principal residence; a note or agreement authorizing the entry of judgment has been construed to be within this requirement. 12 C. F. R. § 226.202 (1971). Since purchase money mortgages are excluded from this requirement the references to it by the lower court in connection with real estate settlements (314 F. Supp. at 1098) and the absence of reference to it in all consumer transactions other than purchase money mortgages indicate that the lower court completely misunderstood the requirements.

6. Any sale on execution against personal property must also be preceded by notices given by the sheriff by handbills posted at least 6 days before the sale under Rule 3128. In the case of a sale of real estate notices must be posted by the sheriff by handbills at least 10 days prior to the sale and also by notices by newspaper publications for 3 weeks prior to the sale with the first publication not less than 21 days prior to the sale under Rule 3129. In either case under the applicable rule the court may by general rule or special order require additional notice to the defendant.

views about the differences between a judgment action and "a normal or pre-judgment creditor-debtor action." 314 F. Supp. at 1095. These views were at the heart of its holding that the judgment procedure is unconstitutional in certain circumstances. *Id.* at 1100. Each of these must be considered since it is submitted that the error in these views led the court into error in its conclusion.

The court said: "The burdens of establishing a defense imposed upon a defaulting debtor who has signed a contract containing a confession of judgment clause and against whom judgment has been entered are greater than those faced by the typical debtor." *Id.* at 1094. This statement (which assumes the existence of a debt and its non-payment) ignores the requirements in an action of assumpsit under Rule 1030 that an affirmative defense has to be pleaded as "new matter" and under Rule 1031 that a counterclaim or set-off has to be pleaded as a counterclaim. As to any of these the defendant has the burden of proof. *Baldwin v. Devereux Schools, Inc.*, 302 Pa. 569, 574, 154 A. 21, 23 (1931.) The action that has to be taken by a defendant in an assumpsit action to avoid a default judgment, judgment on the pleadings or summary judgment is not substantially different from the action required in seeking relief against a judgment entered by confession which requires under Rule 2959 merely a verified statement of "prima facie grounds for relief."

The court also overlooked the rules of law as to actions on promissory notes under section 3-307 of the Uniform Commercial Code that a signature on an instrument is admitted unless specifically denied in the pleadings and that "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense." Pa. Stat. Ann. tit. 12A, § 3-307 (Purdon 1970).

In short, the actions required of a debtor for defensive purposes under the Pennsylvania practice are not materially different whether he is answering a complaint in assumpsit or filing a petition to open or to strike a judgment entered by confession and his time for taking action is identical in both cases. With respect to the various kinds of defenses which might be available to a debtor, such as forgery, payment, accord and satisfaction, waiver, set-off or counterclaim (see Pa. R. C. P. 1030 and 1031), there is no important practical difference in the steps to be taken by a debtor in a *bona fide* compliance with the requirements for verified pleadings in either the assumpsit or judgment procedures.

The same correct understanding of the Pennsylvania procedures answers the comments of the court below relating to the procedure on a petition to open judgment. The court said: "The most striking feature of this latter petition is that the burden of proof is placed upon the debtor who is considered the proponent of a claim and who must convince the court of the need for equitable relief. . . . The placing of this burden upon the debtor is in direct contrast to the burdens in a normal or pre-judgment creditor-debtor action." 314 F. Supp. 1094-95. Again the court below failed to recognize the substantial identity of the defensive actions available to a debtor and the respective burdens of proof in both cases. Furthermore, the court below ignored entirely the course of the Pennsylvania decisions and practice, discussed above, of strictness in passing on the validity of judgments entered by confession and liberality in opening such judgments in the interest of substantive justice.

The court below plainly erred in its statement that depositions are the only basis on which a judge may decide whether to open a judgment. *Id.* at 1095. Pa. R. C. P. 2959(e) specifies that the court shall dispose of a rule to show cause why a judgment should not be stricken or

opened "on petition and answer, and on any testimony, depositions, admissions or other evidence."

The court then added at the same place that: "Besides the burden and expense necessitated by the preparation of these transcripts, the debtor will also require the services of an attorney." *Id.* The need for a responsive pleading in an assumpsit action would make it highly inadvisable for a debtor not to have the services of an attorney in that type of action also. If a layman in fact seeks to represent himself in either case, he is likely to be better off in the more indulgent atmosphere of the equitable principles that govern petitions to open judgments than in the more technical arena of responsive pleadings in law actions. Depositions are not peculiar to a petition to open (when they are used) since they would be involved in discovery proceedings in an assumpsit action where affirmative defenses are asserted.

The lower court at 314 F. Supp. 1095 quoted an excerpt from an opinion of the Pennsylvania Supreme Court in 1953 apparently as an indication of an unfavorable attitude of that court toward the use of authorizations for entry of judgment. The florid language of that excerpt (and of the portion of it omitted by the lower court) is neither accurate nor representative of the views of the Pennsylvania court. Compare the quotation from the opinion of the same court in the *Horner* case in 1954 at page 7 of this brief. In promulgating rules for confession of judgment in 1969 and 1970, Pa. R. C. P. 2950 et seq., the Pennsylvania Supreme Court confirmed that there is no inherent animosity toward the procedure despite the strict supervision of its use.

After it concluded that the Pennsylvania judgment procedure violated the Fourteenth Amendment, the court below mentioned for the first time, in passing, the notice requirement under the state Supreme Court rules. The court below said: "We do not believe that the 20 day notice

provision prior to execution of a confessed judgment under Pa. R. C. P. 2958(b), as recently revised, grants sufficient time to permit a debtor with limited resources to secure an attorney to undertake the above-described procedures for opening or striking off a confessed judgment." 314 F. Supp. at 1101. Since the 20 day period is identical with the notice period for an answer to a complaint in assumpsit, Pa. R. C. P. 1026, the court was thereby impugning the validity of any action at law in Pennsylvania (or, in fact, of any action in the Federal courts). More directly, for the purpose of this case, the court's comment indicates that when it decided that the judgment procedure did not provide the notice required by Due Process, it had disregarded an essential fact which was contrary to its conclusion.

The lower court's mistakes about Pennsylvania law and practice which emerge from this analysis were of crucial importance since its decision purported to be based mainly on practical rather than formal differences between the judgment and assumpsit procedures in Pennsylvania. Both procedures provide substantially equivalent opportunities—and burdens—for a debtor seeking to protect his property from execution sale for unpaid debt. Nothing in the Bill of Rights or its interpretation by this Court should exalt one procedure over the other. On the contrary, the Pennsylvania judgment procedure is well within the Due Process precedents.

This case is ruled specifically by *American Surety Co. v. Baldwin*, 287 U. S. 156 (1932) which dealt with a judgment entered against a surety on the basis of a bond. Justice Brandeis set forth the heart of the question and the Court's decision at 168:

"The Surety Company contends in No. 21 that even if the trial court of the State had jurisdiction, the

federal district court may enjoin the enforcement of the judgment on the ground that, having been entered without notice and an opportunity for a hearing on the construction of the bond, it lacked due process of law. It is true that entry of judgment without notice may be a denial of due process even where there is jurisdiction over the person and subject matter. But that rule is not applicable here. For if the bond properly construed stayed the judgment as against Anderson, the Surety Company consented to the entry of judgment against it without notice for his failure to pay. If the bond did not stay the judgment as against Anderson, the trial court confessedly erred in entering the judgment on the bond. In order to contest its liability the Surety Company had the constitutional right to be heard at some time on the construction of the bond. The state practice provided the opportunity for such a hearing by an appeal after the entry of judgment.

"The practice prescribed was constitutional. Due process requires that there be an opportunity to present every available defense; but it need not be before the entry of judgment. *York v. Texas*, 137 U. S. 15. Cf. *Grant Timber & Mfg. Co. v. Gray*, 236 U. S. 133; *Bianchi v. Morales*, 262 U. S. 170. See also *Phillips v. Commissioner*, 283 U. S. 589, 596-597; *Coffin Bros. & Co. v. Bennett*, 277 U. S. 29. An appeal on the record which included the bond afforded an adequate opportunity. Thus, the entry of judgment was consistent with due process of law. We need not enquire whether its validity may not rest also on the ground that the Surety Company, by giving the bond, must be taken to have consented to the state procedure. Compare *United Surety Co. v. American Fruit Product Co.*, 238 U. S. 140, 142; *Corn Exchange Bank v. Commissioner*, 280 U. S. 218, 223."

The thrust of that decision, specifically involving a judgment entered on the basis of agreement of the debtor, is that the Constitution does not require one form of state procedure as against another so long as notice and an opportunity for a hearing are provided. The rationale of that case was reaffirmed by this Court last term in *Boddie v. Connecticut*, 401 U. S. 371 (1971) wherein the majority opinion said at 378:

"Due process does not, of course, require that the defendant in every civil case actually have a hearing on the merits. A State, can, for example, enter a default judgment against a defendant who, after adequate notice, fails to make a timely appearance, see *Windsor*, *supra*, at 278, or who, without justifiable excuse violates a procedural rule requiring the production of evidence necessary for orderly adjudication, *Hammond Packing Co. v. Arkansas*, 212 U. S. 322, 351 (1909). What the Constitution does require is 'an opportunity . . . granted at a meaningful time and in a meaningful manner,' *Armstrong v. Manzo*, 380 U. S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane v. Central Hanover Tr. Co.*, *supra*, at p. 313. The formality and procedural requisites for the hearing can vary, depending upon the importance of the interests involved and the nature of the subsequent proceedings."

The court below and appellants in their argument rely heavily on *Sniadach v. Family Finance Corp.*, 395 U. S. 337 (1969). That case invalidated a state statutory procedure which permitted pre-judgment garnishment of wages. The majority opinion was explicitly based on the fact that the case involved "wages—a specialized type of property presenting distinct problems in our economic system" and on the harsh practical effects on a wage-earning family of a freeze on the use of wages by reason of garnishment. *Id.* at

340. In Pennsylvania, wages are not subject to either attachment (Act of April 15, 1845, P. L. 459, § 5, Pa. Stat. Ann. tit. 42, § 886 (Purdon 1966)), or assignment (Act of May 20, 1891, P. L. 96, Pa. Stat. Ann. tit. 43, § 271 (Purdon 1964)). Moreover, neither a judgment on the basis of agreement or otherwise nor the lien of an execution levy deprives the debtor of the use of any property in his possession or even necessarily prevents its disposition.⁷ Furthermore, no sale of any property of a debtor on a judgment entered on the basis of agreement can occur before the expiration of the required twenty day notice period during which relief from the judgment and an interim stay can be sought. Hence, the present case is not comparable to *Sniadach* on the operative facts that prompted that decision.

Appellants speak of *Sniadach* as though it stated a broad constitutional rule prohibiting any lien on property of a debtor prior to the opportunity for a hearing under state procedure. That interpretation exaggerates the decision since, if it were so, the majority opinion would not have been based as it was on the special character of wages as property. Even if the Court had framed a rule as broad as appellants imply, it would still not determine the question here. In *Sniadach* the state garnishment procedure was available to a creditor without any agreement of debtor; in Pennsylvania the judgment procedure is wholly dependent on a written agreement which must meet the strict test of the judicial rules for determining the reality of the consent.

7. A transfer could be made subject to the lien and any agreement the debtor would have to make to provide for payment of that lien if the judgment should be sustained would not alter what he would have to do to satisfy such judgment even if the property had not been subjected to lien by agreement. If the judgment should not be sustained the lien would be immaterial in any event.

Appellants' argument, as to *Sniadach*, is tantamount to an attack on all consensual liens which are fundamental to the normal workings of both personal and business finance in America. If a lien on realty obtained through a judgment entered on the basis of agreement were constitutionally invalid on its face, it is not evident what theory could consistently support the validity of a real estate mortgage which in Pennsylvania (and it is believed generally throughout the Nation) results in a lien of higher dignity⁸ and can be obtained without any use of court procedures and the accompanying exercise of immediate judicial control. Even more difficult questions might be raised about pledges of marketable securities, rights of set-off and installment sale agreements for automobiles and other personal property whose enforcement may often be accomplished without any use of public offices or records. While these analogous forms of consensual liens and security commonly provided as collateral for extension of credit are not under attack in this action, the implications for them in the basis of any constitutional decision in this case indicate that the question involves far more than one isolated state procedure.

D. The Use of \$10,000 Annual Income as a Determinant of Due Process Rights by the Court Below Is Without Support in Law or Reason and Was Error Infecting Its Entire Decision.

The opinion of the court below suggests that it was concerned that the extensive effects noted above might flow

8. The lien of a mortgage which precedes other liens except mortgages is not discharged by a judicial sale on a subsequent lien as is a judgment.

The lien of a judgment entered within 4 months of the filing of a petition under the Bankruptcy Act is void while a mortgage is not.

The lien of a judgment requires revival each five years while that of a mortgage does not.

from its decision and thus made an effort to confine its ruling to cases of persons with limited educational backgrounds and limited resources. For that purpose, on the basis of sparse, fragmentary and largely hearsay "evidence", it gave undifferentiated treatment to all debtors with annual incomes of less than \$10,000. The court fixed a limit on the scope of its ruling because it said that the ruling would "make it more difficult for those affected by this decision to secure credit." 314 F. Supp. at 1099. The lower court's opinion itself shows internal inconsistency and lack of rational support for the use of annual income as a determinant of Due Process rights. As to one of the plaintiffs actually before the court, the judgment involved was in the amount of \$25,800 which in common experience is not typical of the credit used by the economically deprived. Common experience likewise contradicts the court's presumption that persons with less than \$10,000 annual income are as a class so incapable of comprehending their credit transactions that the Federal Constitution must invalidate them.

The lower court's selection of \$10,000 as the critical annual income was on too attenuated an evidentiary basis to support a constitutional ruling. The court accepted as "evidence" a study of debtors in default in certain cities, only one of which is identified as being in Pennsylvania. The court below gave no indication of any determination by it of the objectivity, statistical validity or reliability of the document even though it was said to survey only 245 debtors in the one city located in Pennsylvania while the opinion says that in that single city more than 50,000 judgments were entered in one year by confession; the court does not even indicate whether this small sample was restricted to debtors who had authorized the entry of judgment.⁹ From

9. The relative significance of the sample is diminished even more in comparison with the total number of judgment notes and

this sparse and possibly meaningless data, the lower court drew inferences as to the significance of particular dollar amounts of annual income. This methodology for decision of a Due Process question is as impermissible as it would have been if the court had used to find the judgment procedure valid a similarly described study which reported that a like number of borrowers understood the meaning of an agreement to enter judgment and consented to it in order to provide security for credit.

The whimsicality of the \$10,000 income determinant is actually a distraction from the central issue whether any such classification is an appropriate test of Due Process rights. There is nothing in the opinion of the court below to justify the idea that the economic or educational condition of particular individuals affects them or the exercise of their rights differently in a judgment action than in an assumpsit action under Pennsylvania procedures.

The nub of this case is whether both such procedures are equally valid under Due Process requirements since both provide for notice and opportunity for hearing which are substantially the same. The immediate question before the Court is whether the judgment procedure in Pennsylvania satisfies the requirements of Due Process. It is submitted that in the context of the Pennsylvania law and procedures described above, the judgment procedures are well within the commands of the Bill of Rights so that the order of the court below, to the extent it ruled them unconstitutional in any respect, should be reversed.

similar agreements executed in Pennsylvania because of the widespread practice of not filing all judgments which are authorized and the absence of authority to file those which may be entered only after default.

II. THE FEDERAL COURTS SHOULD ABSTAIN FROM RULING ON THE CONSTITUTIONALITY OF THE PENNSYLVANIA JUDGMENT PROCEDURES UNTIL THE SUPREME COURT OF PENNSYLVANIA CONSIDERS THE QUESTION IN THIS CASE.

The judgment procedure in this case bears a patina of history that appears to be as old as any English common law procedure surviving in modern American law. It is no mere ancient relic, however. On the contrary, it is deeply imbedded in the Pennsylvania law of security transactions and creditors rights and has been extensively used in commerce in that state and by the State Government itself.¹⁰ The strong presumption of Constitutionality that attaches to a legal technique extensively practised throughout several centuries possibly explains the apparent absence of any decision of the Pennsylvania Supreme Court dealing explicitly with the validity of the judgment procedure.¹¹

10. A broad range of Pennsylvania statutes concerning public affairs and exercises of the police power provide for use of warrants of attorney to confess judgment. Examples are: bonds to secure payment of deposits of State funds, Pa. Stat. Ann., tit. 72, § 505 (Purdon 1971); bonds of licensees under the Liquor Code, *Id.*, tit. 47, § 4-465(a); and bonds of county tax collectors, *Id.*, tit. 72, § 5541. Procedures comparable to the judgment procedures are found in other statutes such as the Tax Reform Code adopted in 1971 which permits a lien for sales and use tax to be filed without notice and a writ of execution to issue after 10 days notice by mail. Act. No. 2, § 242(b) (Purdon Pa. Legisl. Serv., 1971).

None of these and similar interests of the State is represented on this appeal by reason of the position of the Pennsylvania Attorney General, see footnote 1 above.

11. "The Fourteenth Amendment, itself a historical product, did not destroy history for the states and substitute mechanical compartments of law all exactly alike. If a thing has been practiced for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it, as is well illustrated by *Ownbey v. Morgan*, 256 U. S. 94, 104, 112." Mr. Justice Holmes in *Jackman v. Rosenbaum Co.*, 260 U. S. 22, 31 (1922).

This case, even if it involved merely a state statute, would accordingly present an appropriate occasion for the "abstention doctrine" recently applied in *Fornaris v. Ridge Tool Co.*, 400 U. S. 41 (1970) and *Reetz v. Bozanich*, 397 U. S. 82 (1970). The appropriateness of the application of that doctrine is doubled in the present case since the matter involved is essentially a common law procedure not dependent on statute and is additionally under the Pennsylvania Constitution a subject for the exclusive rule-making authority of the State Supreme Court.¹²

The court below should, therefore, have withheld any decision on the Constitutional question presented to it until the Pennsylvania Supreme Court had ruled on the question. It is true that the judgment procedure has the implicit sanction of the Pennsylvania courts from the course of its decisions over two centuries and from the fact that the Supreme Court of the State has itself promulgated rules for the judgment procedure. Yet a ruling by that court on the question in this case could have avoided the need for decision of the constitutional question or could have materially changed the scope and nature of the question.

First, the Pennsylvania court could have determined authoritatively the precise procedural effects of the judgment procedure as compared with the assumpsit procedure. Second, if that Court deemed the procedure invalid in any particular respect it could have forthwith cured the defect by promulgation of an appropriate rule. Third, even if the court considered the procedure valid, as it might be expected to do on the basis of the past history of its decisions and rules, it could nevertheless have determined to reinforce that validity by supplementary rules.

12. The fact that the validity of state court procedures and rules rather than of a state statute are essentially involved in this case might raise a question whether it was properly brought to this Court on appeal rather than on certiorari under 28 U. S. C. 1253.

All the reasons that generally underlie the abstention doctrine are appropriate to this case including considerations of Federal-State relationships, the interests of sound judicial administration and the economical use of judicial resources. In addition, there are specific reasons which apply to this case which compel the conclusion that this Court abstain from decision pending proceedings in the state's highest court. The constitutional issue presented by this appeal has been blurred by the errors and misconceptions of the lower court as to the relative practical effects of the Pennsylvania judgment and assumpsit procedures. An authoritative ruling by the state court would at the least disentangle the constitutional question from the problems of assessing the state law in a manner less vulnerable to question than is the opinion of the court below. The terms of the final order of the court below shows the absence of impelling urgency for its decision since its injunction was generally prospective¹³ and even as to cases it covered it provided for further state court proceedings.

It was especially inappropriate for the court below to undertake immediately¹⁴ and unnecessarily an evaluation

13. The lower court's postponement of the effective date of its order in a manner related to the sessions of the General Assembly of Pennsylvania suggests that it did not realize that the Pennsylvania Supreme Court rather than the legislature has ultimate rule-making power on the subject of confession of judgment under Article V, section 10(c) of the Pennsylvania Constitution.

14. An opportunity for an early consideration of the matter by the Pennsylvania Supreme Court would seem readily available under the Pennsylvania Appellate Court Jurisdiction Act of 1970 which provides:

"§ 211.205 Extraordinary jurisdiction.

"Notwithstanding any other provision of law, the Supreme Court may, on its own motion or upon petition of any party, in any matter pending before any court or justice of the peace of the Commonwealth involving an issue of immediate public impor-

of a matter so deeply imbedded in state law and practice because of the potential for widespread disruption of property rights that could be caused by the decision of this case. Appellants argue that the judgment procedure should be declared invalid on its face without limitation to prospective application only. If that argument were sustained the effects on real estate titles in Pennsylvania would be massively detrimental, as is pointed out in the Brief of Amicus Curiae Pennsylvania Land Title Association filed in this appeal, and could cause harm to members of the class appellants undertake to represent far in excess of any harm that appellants claim results from the procedure attacked. This factor alone should have moved the court below to withhold its decision until the state court could consider this matter in the full context of Pennsylvania law.

For all of the above reasons, it is submitted that this Court should not hold the Pennsylvania judgment procedure unconstitutional in any respect without awaiting a prior consideration of the matter by the Supreme Court of Pennsylvania.

CONCLUSION.

The Pennsylvania judgment procedures in question are common law court procedures established by the Pennsylvania Supreme Court and are subject to the effective supervision and control of the Pennsylvania courts. A careful review and comparison of these procedures with the assumpsit procedures approved by the court below clearly demonstrate that the judgment procedures provide sufficient notice and ample opportunity for hearing and relief and therefore fully comply with the requirements of Due Process.

tance, assume plenary jurisdiction of such matter at any stage thereof and enter a final order or otherwise cause right and justice to be done". Pa. Stat. Ann., tit. 17, §211.205 (Purdon Supp. 1971)

The decision of the court below should accordingly be reversed to the extent that it declared the Pennsylvania judgment procedures unconstitutional.

In the alternative, for all of the reasons stated above, including but not limited to the special role of the Pennsylvania Supreme Court under the State Constitution with respect to the court procedures involved, the misconceptions of the lower court concerning Pennsylvania law and practice and in the interest of Federal-State relationships particularly in the area of sound judicial administration, the federal courts should abstain from deciding the constitutional issue adversely until the Supreme Court of Pennsylvania considers the question.

Respectfully submitted;

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November 3, 1971.

Syllabus

SWARB ET AL. v. LENNOX ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF PENNSYLVANIA

No. 70-6. Argued November 9, 1971—Decided February 24, 1972

Appellants (hereafter plaintiffs), purporting to act on behalf of a class consisting of all Pennsylvania residents who signed documents containing cognovit provisions leading, or that could lead, to confessed judgments in Philadelphia, brought this action challenging the Pennsylvania system as unconstitutional on its face as violative of due process. The three-judge District Court held that: the Pennsylvania system leading to confessed judgments and execution complies with due process only if "there has been an understanding and voluntary consent of the debtor in signing the document"; plaintiffs did not sustain their burden of proof with respect to lack of valid consent in the execution of bonds and warrants of attorney accompanying mortgages; the record did not establish that the action could be maintained on behalf of natural persons with incomes over \$10,000, but an action could be maintained for those who earn less than \$10,000 and who signed consumer financing or lease contracts containing cognovit provisions; there was no intentional waiver of known rights by members of that class in executing confession-of-judgment clauses; and no judgment by confession might be entered after November 1, 1970, as to a member of the recognized class unless it is shown that the debtor "intentionally, understandingly, and voluntarily waived" his rights; and the court declared the Pennsylvania practice of confessing judgments to be unconstitutional, prospectively effective as noted, as applied to the designated class, and enjoined entry of any confessed judgment against a member of the class absent a showing of the required waiver. The plaintiffs appealed, claiming that the entire Pennsylvania scheme is unconstitutional on its face. *Held*:

1. The Pennsylvania rules and statutes relating to cognovit provisions are not unconstitutional on their face, as under appropriate circumstances, a cognovit debtor may be held effectively and legally to have waived the rights he would possess if the document he signed had contained no cognovit provision. *D. H. Overmyer Co. v. Frick Co.*, ante, p. 174. P. 200.

2. In light of the fact that the named defendants and the intervenors have taken no cross appeal, the affirmance of the judgment

below does not mean that the District Court's opinion and judgment are approved as to other aspects and details that were not before this Court. P. 201.

314 F. Supp. 1091, affirmed.

BLACKMUN, J., delivered the opinion of the Court, in which BURGER, C. J., and BRENNAN, STEWART, WHITE, and MARSHALL, JJ., joined. WHITE, J., filed a concurring opinion, *post*, p. 202. DOUGLAS, J., filed an opinion dissenting in part, *post*, p. 203. POWELL and REHNQUIST, JJ., took no part in the consideration or decision of the case.

David A. Scholl argued the cause for appellants *pro hac vice*. With him on the briefs was Harvey N. Schmidt.

Philip C. Patterson argued the cause for appellees. With him on the brief for appellees Middle Atlantic Finance Assn. et al. was Marvin Comisky. J. Shane Creamer, Attorney General, and Barry A. Roth, Assistant Deputy Attorney General, filed a brief for appellee the Commonwealth of Pennsylvania.

William L. Matz argued the cause for the Pennsylvania Savings & Loan League as *amicus curiae* urging affirmance. With him on the brief was Herbert Bass.

Briefs of *amici curiae* urging reversal were filed by Don B. Kates, Jr., Martin R. Glick, and Carol Ruth Silver for California Rural Legal Assistance et al.; by John J. Brennan and Gordon W. Gerber for the Pennsylvania Bankers Assn.; by David M. Jones for the Pennsylvania Credit Union League; and by Edward Donald Foster and Blair C. Shick for the National Consumer Law Center.

Briefs of *amici curiae* urging affirmance were filed by Matthew Hale for the American Bankers Assn., and by Gilbert Nurick and Moses K. Rosenberg for the Pennsylvania Land Title Assn.

MR. JUSTICE BLACKMUN delivered the opinion of the Court.

This appeal, heard as a companion to *D. H. Overmyer Co. v. Frick Co.*, ante, p. 174, decided today, also purports to raise for the Court the issue of the due process validity of cognovit provisions. The system under challenge in this case is that of Pennsylvania.¹ The three-judge District Court, with one judge dissenting in part because, in his view, the court did not go far enough, refrained from declaring the Commonwealth's rules and statutes unconstitutional on their face and granted declaratory and injunctive relief only for a limited class of cognovit signers. 314 F. Supp. 1091 (ED Pa. 1970). The plaintiffs, but not the defendants, appealed. We noted probable jurisdiction the same day certiorari was granted in *Overmyer*. 401 U. S. 991.

I

The cognovit system is firmly entrenched in Pennsylvania and has long been in effect there.

A confession of judgment for money "may be entered by the prothonotary . . . without the agency of an attorney and without the filing of a complaint, declaration or confession, for the amount which may appear to be due from the face of the instrument," Pa. Rule Civ. Proc. 2951 (a), except that the action must be instituted by a complaint if the instrument is more than 10 years

¹ Pa. Rules Civ. Proc. 2950-2976, effective Jan. 1, 1970 (which, by the Act of June 21, 1937, Pa. Laws 1982, have the effect of state statutes); Act of Apr. 14, 1834, Pa. Stat. Ann., Tit. 17, § 1482 III; Act of Feb. 24, 1806, Pa. Stat. Ann., Tit. 12, § 739; Act of Mar. 21, 1806, Pa. Stat. Ann., Tit. 12, § 738. By Rule 2976, Pa. Stat. Ann., Tit. 12, § 739 is suspended "only insofar as it may be inconsistent with these rules," and Pa. Stat. Ann., Tit. 12, § 738 is suspended in its application to actions to confess judgment for money or for possession of real property.

old or cannot be produced for filing, "or if it requires the occurrence of a default or condition precedent before judgment may be entered." Rules 2951 (c) and (d). In an action instituted by a complaint, the plaintiff shall file a confession of judgment substantially in a prescribed form, and the attorney for the plaintiff "may sign the confession as attorney for the defendant" unless a statute or the instrument provides otherwise. Rule 2955. The prothonotary enters judgment "in conformity with the confession." Rule 2956.² The amount due, interest, attorneys' fees, and costs may be included by the plaintiff in the praecipe for a writ of execution. Rule 2957.

Within 20 days after the entry of judgment the plaintiff shall mail the defendant written notice. Failure to do this, however, does not affect the judgment lien. Rule 2958 (a). Within the same 20 days the plaintiff may issue a writ of execution and may do so even if the notice is not yet mailed. Rule 2958 (b). If an affidavit of mailing is not filed within the 20-day period, the writ of execution may not issue until 20 days after the affidavit of mailing has been filed. Rule 2958 (c).

Relief from a judgment by confession may be sought by a petition asserting "[a]ll grounds for relief whether to strike off the judgment or to open it" Rule 2959 (a). If the petition states prima facie grounds for relief, the court issues a rule to show cause and may grant a stay. A defendant "waives all defenses and objections" not included in the petition. The court "shall dispose of the rule on petition and answer, and on any testimony, depositions, admissions and other evidence." Rules 2959 (b), (c), and (e). If the judgment is opened in whole or in part, the issues are then tried. Rule 2960.

² Prior to the effective date of Rules 2950-2976, Pa. Stat. Ann., Tit. 12, § 738 provided that it "shall be the duty" of the prothonotary to enter an application and "on confession in writing . . . he shall enter judgment"

The procedure for confession of judgment for possession of real property is essentially the same except that the action shall be commenced by filing a complaint. Rules 2970-2973.

The prothonotary specifically is given power to "enter judgments at the instance of plaintiffs, upon the confessions of defendants." Pa. Stat. Ann., Tit. 17, § 1482. The prothonotary is the clerk of the court of common pleas. He has no judicial function. It has been said that his power is derived from the instrument under which he acts and not from his office, *Smith v. Safeguard Mut. Ins. Co.*, 212 Pa. Super. 83, 87, 239 A. 2d 824, 826 (1968), and that his entry of judgment is a ministerial act, *Lenson v. Sandler*, 130 Pa. 193, 197, 241 A. 2d 66, 68 (1968).

It has also been said that the confession of judgment procedure in Pennsylvania exists "independent of statute." *Equipment Corp. of America v. Primos Vanadium Co.*, 285 Pa. 432, 437, 132 A. 360, 362 (1926); *Cook v. Gilbert*, 8 Serg. & R. 567, 568 (1822); *Hatch v. Stitt*, 66 Pa. 264 (1870).

It is apparent, therefore, that in Pennsylvania confession-of-judgment provisions are given full procedural effect; that the plaintiff's attorney himself may effectuate the entire procedure; that the prothonotary, a nonjudicial officer, is the official utilized; that notice issues after the judgment is entered; and that execution upon the confessed judgment may be taken forthwith. The defendant may seek relief by way of a petition to strike the judgment or to open it, but he must assert prima facie grounds for this relief, and he achieves a trial only if he persuades the court to open. Meanwhile, the judgment and its lien remain.

The pervasive and drastic character of the Pennsylvania system has been noted. *Cutler Corp. v. Latshaw*, 374 Pa. 1, 4-5, 97 A. 2d 234, 236 (1953). See *Kine v. Forman*,

404 Pa. 301, 172 A. 2d 164 (1961), and *Atlas Credit Corp. v. Ezrine*, 25 N. Y. 2d 219, 250 N. E. 2d 474 (1969).

II

Seven individuals are the named plaintiffs in the original complaint filed in December 1969. Jurisdiction is based on the civil rights statutes, 28 U. S. C. § 1343 and 42 U. S. C. § 1983. The plaintiffs purport to act on behalf of a class consisting of all Pennsylvania residents who have signed documents containing cognovit provisions leading, or that could lead, to a confessed judgment in Philadelphia County. The defendants are the county's prothonotary and sheriff, the officials responsible, respectively, for the recording of confessed judgments and for executing upon them. The complaint alleges that each plaintiff has signed one or another type of consumer financing agreement pursuant to which his creditor has entered judgment; that each faces immediate judicial sale of his home or personal belongings; that the Pennsylvania rules and statutes are unconstitutional on their face because they deprive members of the class of procedural due process in the denial of notice and hearing before judgment; that the signing of the cognovit contract was not an intelligent and voluntary waiver of the right to notice and hearing; that the only recourse against the recorded judgment is an action to strike or reopen; and that such recourse is costly and burdensome to low income consumers, and denies them equal protection. The relief sought is a declaration that the Pennsylvania rules and statutes are unconstitutional, and an injunction against the defendants' "operating under the above acts and rules." A three-judge court was requested.

The single District Judge entered a temporary restraining order staying execution of judgments against the seven plaintiffs. He also provided a procedure for add-

ing additional plaintiffs. The three-judge court continued and expanded the restraining order to stay all executions upon confessed judgments in the Commonwealth. A number of additional plaintiffs were added, and one original plaintiff was dismissed from the case. A group of finance companies was permitted to intervene.

Stipulations were made. One was between counsel for the plaintiffs and the city solicitor; another was between counsel for the plaintiffs and for the intervenor finance companies. These stipulations are not identical but they do overlap. They established the following:

1. Judgments by confession against the various plaintiffs had been entered ranging in amounts from \$249.23 to \$25,800.

2. If called as witnesses, the original plaintiffs would testify to the facts alleged in the complaint. Each would also testify as to his unawareness of the cognovit clause, his lack of understanding of its significance if he had read it, and his inability to bargain about it anyway.

3. If called, some of the plaintiffs would testify that they were encouraged not to read their contracts; that the judgments exceeded the debts because of the addition of penalties, costs, and fees; that they could not afford proceedings to strike or reopen; and that they believed they had meritorious defenses.

4. The imposition and amount of sheriff's costs, bar association fee schedules, and necessary deposition and transcript costs in the cognovit procedure were acknowledged.

The three-judge court held a hearing. In addition to the appearance of counsel for the plaintiffs and for the intervenors, an assistant city solicitor of Philadelphia appeared for the named defendants, and a Deputy Attorney General appeared for the Commonwealth. The only plaintiff to testify was one of those added after the complaint had been filed. She was a postal

clerk who earned \$6,100 annually and who had agreed with a door-to-door salesman to buy a carpet for \$1,300. Her contract contained a cognovit clause pursuant to which a finance company had obtained a confessed judgment. A detective and a finance company officer were presented by the plaintiffs. They testified to the pervasiveness of cognovit clauses and the "disbelief and shock" of those who had signed them.

The plaintiffs also introduced in evidence by stipulation a published report by David Caplovitz, Ph. D., *Consumers in Trouble*. This was a 1968 study of confessed judgment debtors in four major Pennsylvania cities. It included 245 Philadelphia debtors. The study purported to show that 96% had annual incomes of less than \$10,000, and 56% less than \$6,000; that only 30% had graduated from high school; and that only 14% knew the contracts they signed contained cognovit clauses.

The only other witness at the hearing was one called by the intervenors. He was a finance company officer and testified as to the usual practice of making loans.

The three-judge District Court held:

1. The Pennsylvania system leading to confessed judgment and execution does comply with due process standards provided "there has been an understanding and voluntary consent of the debtor in signing the document." 314 F. Supp., at 1095.

2. If, however, there is no such understanding consent, the procedure violates due process requirements of notice and an opportunity to be heard. *Ibid*.

3. The plaintiffs did not sustain their burden of proof with respect to the lack of valid consent in the execution of bonds and warrants of attorney accompanying mortgages. *Id.*, at 1098.

4. The record did not establish that the action could be maintained as a class action on behalf of individual

natural persons with annual incomes of more than \$10,000. *Id.*, at 1098-1099.

5. It could be maintained, however, as a class action on behalf of natural persons residing in Pennsylvania who earn less than \$10,000 annually and who signed consumer financing or lease contracts containing cognovit provisions. *Id.*, at 1099.

6. There was no intentional waiver of known rights by members of that class in executing confession-of-judgment clauses. These were the right to have prejudgment notice and hearing, the right to have the burden of proof on the creditor, and the right to avoid the expenses attendant upon opening or striking a confessed judgment. Since the Pennsylvania procedure with respect to the designated class was based upon a waiver concept without adequate understanding, it was violative of due process. *Id.*, at 1100.

7. It was not the federal court's function to dictate to Pennsylvania "exactly what constitutes understanding waiver." *Ibid.* Where the debtor is an attorney, an affidavit to that effect may be all that is necessary to prove understanding, but where the debtor is not a high school graduate more proof "may be required." *Id.*, at 1101. A "statewide rule or legislation providing for the filing of proof of intentional, understanding and voluntary consent," in order to comply with the court's opinion, was among the methods available to the State to permit continued use of the confession-of-judgment clause. *Id.*, at 1100-1101, n. 24.

8. No judgment by confession may be entered as to a member of the recognized class after November 1, 1970, unless it is shown that at the time of executing the document the debtor "intentionally, understandingly, and voluntarily waived" his rights lost under the Pennsylvania law. *Id.*, at 1102-1103.

9. Liens of judgments recorded prior to June 1, 1970 (the date of the filing of the court's opinion), were preserved. A confessed judgment on a contract signed before June 1 could be entered between that date and November 1, but could not be executed upon without a prior hearing to determine the validity of the waiver.

The court then declared the Pennsylvania practice of confessing judgments to be unconstitutional, prospectively effective as of the dates stated, as applied to the class designated, and enjoined the entry of any confessed judgment against a member of the class in the absence of a showing of the required waiver.³ *Id.*, at 1103. The judge dissenting did so as to the limitation of relief to those earning less than \$10,000 annually. *Id.*, at 1102.

III

From this judgment only the plaintiffs appeal. Their claim is that the District Court erred in confining the relief it granted to certain members of the appellants' proffered class and that the court should have declared the Pennsylvania rules and statutes unconstitutional on their face. A holding of facial unconstitutionality, of course, wholly apart from any class consideration, would afford relief to every Pennsylvania cognovit obligor. Today's decision in *Overmyer*, although it concerns a corporate and not an individual debtor, is adverse to this contention of the plaintiff-appellants. In *Overmyer* it is recognized, as the District Court in this case recognized, that, under appropriate circumstances, a cognovit debtor may be held effectively and legally to have waived those rights he would possess if the document he signed had contained no cognovit provision.

On the plaintiff-appellants' appeal, therefore, the judgment of the District Court must be affirmed.

³ Compare the result reached with respect to the Delaware system in *Osmond v. Spence*, 327 F. Supp. 1349 (Del. 1971).

This affirmance, however, does not mean that the District Court's opinion and judgment are approved as to their other aspects and details that are not before us. As has been noted, the named defendants and the intervenors have taken no cross appeal. Furthermore, the Pennsylvania Attorney General's office, apparently due to an interim personnel change, no longer supports the position taken at the trial by the city solicitor and the deputy attorney general and, not choosing to pursue its customarily assumed duty to defend the Commonwealth's legislation, now joins the appellants in urging here that the rules and statutes are facially invalid. With the Attorney General taking this position, argument on the side of the defendant-appellees has been presented to us only by the intervenor finance companies and by amici. The permissible reach of this opposition, however, coincides with and goes no further than the extent of the appellants' appeal. In the absence of a cross appeal, the opposition is in no position to attack those portions of the District Court's judgment that are favorable to the plaintiff-appellants.

IV

The decision in *Overmyer* and the disposition of the present appeal prompt the following observations:

1. In our second concluding comment in *Overmyer*, *supra*, at 188, we state that the decision is "not controlling precedent for other facts of other cases," and we refer to contracts of adhesion, to bargaining power disparity, and to the absence of anything received in return for a cognovit provision. When factors of this kind are present, we indicate, "other legal consequences may ensue." That caveat has possible pertinency for participants in the Pennsylvania system.

2. *Overmyer* necessarily reveals some discomfiture on our part with respect to the present case. However that

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may be, the impact and effect of *Overmyer* upon the Pennsylvania system are not to be delineated in the one-sided appeal in this case and we make no attempt to do so.

3. Problems of this kind are peculiarly appropriate grist for the legislative mill.

On the appellants' appeal, the judgment of the District Court is affirmed. The stay heretofore granted by the Circuit Justice is dissolved.

Is is so ordered.

MR. JUSTICE POWELL and MR. JUSTICE REHNQUIST took no part in the consideration or decision of this case.

MR. JUSTICE WHITE, concurring.

I join in the opinion of the Court and add these comments about a narrow aspect of the case.

It is true that this Court has no jurisdiction of that portion of the District Court's judgment from which no appeal or cross-appeal was taken. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 191-192 (1937); cf. *United States v. Raines*, 362 U. S. 17, 27 n. 7 (1960). But it is also well established that the prevailing party below need not cross-appeal to entitle him to support the judgment in his favor on grounds expressly rejected by the court below. *Walling v. General Industries Co.*, 330 U. S. 545 (1947); *Langnes v. Green*, 282 U. S. 531, 534-539 (1931); *United States v. American Railway Express Co.*, 265 U. S. 425, 435-436 (1924); and the Court may notice a plain error in the record which disposes of a judgment before it. *Reynolds v. United States*, 98 U. S. 145, addendum n. to op., pp. 168-169 (1879). Thus, despite the fact that appellee-intervenors did not cross-appeal, they were free to support that part of the judgment in their favor on grounds that were presented and rejected by the District Court

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in arriving at an adverse judgment on other aspects of the case. Those grounds, if sustained, would not affect the finality of the unappealed judgment, but they would, if sufficient, be available to support the judgment of the District Court insofar as it is challenged here. Nothing to the contrary is to be inferred from our affirmance of that judgment on other grounds. At least that is my understanding of the Court's opinion, which I join.

MR. JUSTICE DOUGLAS, dissenting in part.

Pennsylvania permits creditors to extract from debtors their consent to a confession-of-judgment procedure which, while not rendering debtors completely defenseless, deprives them of many of the safeguards of ordinary civil procedure. A group of low-income plaintiffs asked the three-judge court below to enjoin the further operation of this scheme on the ground that debtors who consented to this abbreviated form of justice did so unwittingly or did so out of compulsion supplied by standard form of adhesion contracts. The District Court granted limited relief, holding that the scheme worked a denial of procedural due process only when applied to individual debtors who earned less than \$10,000 annually and who entered into nonmortgage credit transactions, except where it is shown prior to judgment that their waivers had been knowing and voluntary. The plaintiffs have appealed, arguing that the lower court should have invalidated the regime on its face and that, in any event, class relief was wrongly denied both to persons earning more than \$10,000 yearly and to home mortgagors.

The Commonwealth did not cross-appeal but instead now confesses that the scheme is unconstitutional and agrees substantially with the appellants. Various lending institutions intervened below, but have not taken

cross-appeals.¹ When the appeal was filed in this Court, they did, however, file a motion to dismiss that contained an argument on the law governing the main facets of the case. Moreover, at the request of this Court they filed a brief, maintaining that the District Court correctly excluded mortgage borrowers and consumer borrowers with incomes in excess of \$10,000 from the class benefited by the decree and that it incorrectly found that the Pennsylvania *cognovit* procedure was unconstitutional unless the debtor knowingly and understandingly consented to the authorization to confess judgment.

¹ The absence of a cross-appeal means only that the appellate court will not upset any portion of the lower court's judgment not challenged by the appeal. As stated by Mr. Justice Cardozo in *Morley Construction Co. v. Maryland Casualty Co.*, 306 U. S. 185, 191-192:

"Without a cross-appeal, an appellee may 'urge in support of a decree any matter appearing in the record although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.' *United States v. American Railway Express Co.*, 265 U. S. 425, 435. What he may not do in the absence of a cross-appeal is to 'attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below.' *Ibid.* The rule is inveterate and certain. . . . Findings may be revised at the instance of an appellant, if they are against the weight of evidence, where the case is one in equity. This does not mean that they are subject to like revision in behalf of appellees, at all events in circumstances where a revision of the findings carries with it as an incident a revision of the judgment. There is no need at this time to fix the limits of the rule more sharply. 'Where each party appeals each may assign error, but where only one party appeals the other is bound by the decree in the court below, and he cannot assign error in the appellate court, nor can he be heard if the proceedings in the appeal are correct, except in support of the decree from which the appeal of the other party is taken.'"

The appellees are the county's prothonotary and sheriff and they are represented here by the Attorney General of Pennsylvania who concedes before us that the State's statutes in question are unconstitutional. No one suggests, however, that there is lacking a case or controversy. Appellants say the District Court did not go far enough. Whether we affirm, modify, or reverse, the decree of the District Court has an ongoing life. It has not become moot. Large interests ride on the outcome of this important litigation.

It is said, however, that the case is not appropriate for review. We refuse to let confessions of error conclusively govern the disposition of cases, acting only after our examination of the record.² We have remanded for reconsideration in light of a confession of error. In *Young v. United States*, 315 U. S. 257 (1942), however, we declined to remand but instead incorporated into our holding the theory advanced by the Solicitor General in support of the petitioner. Obviously a remand does not bind the courts to the parties' view as to what the law is.

"The considered judgment of the law enforcement officers that reversible error has been committed is entitled to great weight, but our judicial obligations compel us to examine independently the errors confessed." *Id.*, at 258-259.

As we stated in *Sibron v. New York*, 392 U. S. 40, 58:

"It is the uniform practice of this Court to conduct its own examination of the record in all cases where the Federal Government or a State confesses that a conviction has been erroneously obtained."

² *Mayberry v. Pennsylvania*, 382 U. S. 286 (1965); *Nicholson v. Boles*, 375 U. S. 25 (1963). See R. Stern & E. Grossman, *Supreme Court Practice* 224-225 (4th ed. 1969).

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That is the practice in civil cases also. *Cates v. Haderlein*, 342 U. S. 804.

Moreover, once a case is properly here, our disposition does not necessarily follow the recommendations or concessions of the parties. *Utah Comm'n v. El Paso Gas Co.*, 395 U. S. 464, 468-469. In that case the appellant changed its view of the merits after the case reached us and, like the appellee, thought the appeal should be dismissed. An *amicus*, however, presented contrary views. We concluded that the decree of the District Court, after our prior remand, did not comply with our order. Consensus of the parties does not, in other words, control our decisionmaking process.²

The Court, to be sure, approves that part of the District Court's opinion which holds that the Pennsylvania confession of judgment scheme cannot constitutionally be applied to the class of Pennsylvania residents who earn less than \$10,000 annually and who enter into nonmortgage credit transactions, unless prior to judgment it is shown that they voluntarily and knowingly executed such instruments purporting to waive trial and appeal. On the other hand, the Court now affirms without discussion the refusal of the District Court (1) to extend similar class relief to confessed debtors who either enter into mortgage transactions or who earn more than \$10,000 yearly, and (2) to declare the statutes facially unconstitutional. 314 F. Supp. 1091, 1102-1103, 1112 (E.D. Pa. 1970).

² Cf. *California Welfare Rights Organization v. Superior Court of Alameda County*, 5 Cal. 3d 730, 488 P. 2d 953 (1971), where a state official against whom an adverse judgment had been obtained took no appeal; but the judgment was challenged in California by an "aggrieved" organization which had been denied intervention in the lower court and which appealed both from the denial of intervention and from the judgment on the merits. The California Supreme Court reversed on the merits.

It is anomalous that an appellee by confessing error can defeat an appeal. In the instant case we have not been handicapped by the appellees' refusal to oppose the judgment below. Finance companies intervened in the District Court. We have been fully informed by them and by *amici* of the many facets of this controversy. We should therefore discuss the merits and reach all issues tendered.